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BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 16,249

EARLE L. REYNOLDS,

Appellant,

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

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TABLE OF CONTENTS

Table of Cases

Statutes and Regulations:

Miscellaneous:

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Jurisdictional Statement

This is an appeal from a conviction and sentence in the United States District Court for the District of Hawaii. This Court has jurisdiction under 28 U.S.C. § 1291. Jurisdiction of the case below was based on 18 U.S.C. § 3231.

Statute and Regulation Involved

Section 161 of the Atomic Energy Act (42 U.S.C. § 2201, 68 Stat. 948) provides in relevant part:

> In the performance of its functions the [Atomic Energy] Commission is authorized to—
>
> * * * * * * *

(i) prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this Act, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 53 or produced by any person in connection with any activity authorized pursuant to this Act, and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;

* * * * * * *

(q) make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act.

Section 223 of the Atomic Energy Act (42 U.S.C. § 2273, 68 Stat. 958) provides:

Whoever willfully violates, attempts to violate, or conspires to violate, any provision of this Act for which no penalty is specifically provided or of any regulation or order prescribed or issued under section 65 or subsections 161b, i. or p. shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both, except that whoever commits such an offense with intent to injure the United States or with intent to secure an advantage to any foreign nation,

shall, upon conviction thereof, be punished by a fine of not more than $20,000 or by imprisonment for not more than twenty years, or both.

The contested regulation of the Atomic Energy Commission is set forth in full in Appendix A, p. 78, *infra*.

Questions Presented

1. Does Section 161(i) authorize the Atomic Energy Commission to issue a regulation barring United States citizens from entering the Pacific nuclear testing zone covering 390,000 square miles of the high seas?

2. If Section 161(i) were construed to authorize the Commission to issue a regulation barring United States citizens from the testing zone under pain of severe criminal penalities, would the section then be too vague and indefinite to satisfy constitutional requirements?

3. Do the Pacific nuclear tests and the regulation under which appellant was convicted violate international commitments of the United States?

4. Was appellant deprived of First and Fifth Amendment rights under the Commission regulation which restrains peaceable protest and freedom of movement and which was adopted without the requisite notice and opportunity for hearing?

5. Was appellant denied his right under the Sixth Amendment to be defended by the counsel of his choice?

Statement of the Case

On September 15, 1957 the Atomic Energy Commission announced a new series of nuclear tests to begin in April 1958 at the Eniwetok Proving Grounds in the Pacific. Early in January 1958 the Commission received a notification from certain persons that they intended to sail their ketch, the Golden Rule, into the test area as a protest against the

holding of these nuclear tests. On February 14, 1958 the Commission issued a public notice designating a "Danger Area" to be established April 5, 1958, in connection with the tests and covering 390,000 square miles of high seas. On March 25, 1958 the Golden Rule sailed from California for Hawaii en route to carry out the announced protest. On April 11, 1958 the Commission, without notice or hearing, issued a regulation barring United States citizens from the Danger Area "except with the express approval of appropriate officials of the Atomic Energy Commission or the Department of Defense" (23 FR 2401, p. 78, *infra*). It is this regulation under which appellant was convicted and which he here challenges as invalid.[1]

Appellant is an anthropologist (R. 416). His particular field of interest is the study of the growth and development of human beings (R. 416). In 1951, when the chain of circumstances commenced which brought appellant into conflict with his Government for the first time in his life, appellant was Research Associate and Chairman of the Department of Physical Growth at the Fels Research Institute for the Study of Human Development and at the same time an Associate Professor of Anthropology at Antioch College with life tenure (R. 416). In that year appellant was asked by officials of the National Academy of Sciences to go to Japan "to set up a scientific program so that the problem of possible deleterious effect of atomic radiation on the surviving children of Hiroshima and

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[1] The facts in this first paragraph appear in the affidavit of April 22, 1958, of Kenneth E. Fields, General Manager of the Atomic Energy Commission, entered into the record of the "Golden Rule" case by the Government and referred to by Mr. Joseph L. Rauh, Jr. in his argument in the District Court for a judgment of acquittal or new trial (R. 356). On the basis of this affidavit, Mr. Rauh offered to prove at such a new trial that the regulation which appellant disregarded "was aimed solely at the Golden Rule" and that the Commission issued "it without a hearing at the last minute in order to avoid one" (R. 358).

Nagasaki could be competently studied'' (R. 416). Reluctantly, and as a ''gesture of service'', appellant accepted the assignment, went to Japan, set up his research program and resigned his permanent positions at Antioch and the Fels Research Institute (R. 416-417). Appellant spent the next three and one-half years ''studying the effects of radiation on the children of Hiroshima and Nagasaki'' (R. 417) and, not unexpectedly, ''became extremely interested . . . with the problem of radiation, particularly as it affects the growth and development of human beings'' (R. 417).

At the conclusion of the basic study in 1954 and with the understanding that appellant would return to Japan four years later to do a follow-up study (R. 417), appellant took his family around the world on the yacht Phoenix, which he had built during his stay in Hiroshima (R. 417-418). The family sailed 50,000 miles between 1954 and 1958 visiting 106 ports and talking to hundreds of people (R. 418). During the trip appellant became ''somewhat aware of the problems of the world outside of the scientists' laboratory'' (R. 418-419).

In May of 1958 the Phoenix and its crew sailed into Honolulu harbor in the midst of the Golden Rule controversy (R. 419). ''As a scientist there was no doubt in . . . [appellant's] mind, as there is no doubt in the minds of hundreds of scientists throughout the world, that there is grave danger to the human race from the fallout which accrues from testing . . .'' (R. 419-420). While the Golden Rule controversy raged, appellant spent many hours in the library studying the materials published by the Atomic Energy Commission and found their reports on fallout ''badly slanted'' (R. 420). He also came to the conclusion, on the basis of his reading and studying, that the Commission regulation, which prohibited entry into the 390,000

square-mile nuclear testing zone, was "illegal and unconstitutional" (R. 422).

Early in June, 1958, the Phoenix sailed from Honolulu en route by way of the high seas to Japan (R. 218, 423). Aboard the Phoenix were appellant, his wife, his son Ted, his daughter Jessica and a Japanese friend who had been with the Reynolds family on their trip around the world (R. 423). They had not decided at the time they sailed from Honolulu whether they would enter the prohibited zone or not (R. 423). During the next three weeks aboard ship, they read more of the accumulated literature on the dangers of nuclear fallout, talked at length among themselves about the problems involved and finally reached a mutual understanding to enter the prohibited area as a protest (R. 423-424). Appellant's motivations for this drastic step were simple: his "scientific knowledge that anything that would stop nuclear testing is bound to ultimately be to the benefit of mankind" (R. 425); his "belief that the freedom of the seas and freedom of navigation on the seas were being threatened" (R. 425); and his view that the Commission's regulation was "illegal and unconstitutional" (R. 422). He felt deeply his "unique . . . dual role of a scientist and at the same time as a yachtsman" (R. 415).

On July 1 the Phoenix approached the Danger Area with the Coast Guard cutter Planetree close by (R. 210-211). Later that day the Phoenix sent a radio message announcing that "we are entering today the nuclear testing area in protest against nuclear testing; please inform appropriate civil authorities . . ." (R. 228). The next morning, July 2, appellant was arrested by the Coast Guard cutter 65 miles inside the Danger Area and was directed to sail the Phoenix to Kwajalein (R. 211, 221).

On July 8 appellant was flown to Honolulu by military

aircraft and taken before the U. S. Commissioner for a preliminary hearing (R. 320). Appellant immediately "announced that he intended to retain a mainland attorney" for his defense (R. 320). Shortly thereafter, appellant retained Katsugo Miho, a local attorney, to handle preliminary matters prior to the time that he could contact and retain mainland counsel (R. 320).[2]

On July 21 appellant waived a grand jury indictment and a criminal information was filed against him charging a violation of the Commission's regulation prohibiting United States citizens from entering the nuclear test area (R. 3,321). On July 28 appellant received permission to go to the mainland to seek counsel (R. 321) and did retain Joseph L. Rauh, Jr., of Washington, D. C., as his counsel (R. 321-322). To allow time for Mr. Rauh to participate, appellant first sought a postponement of the argument, scheduled for August 6, upon his Motion to Dismiss (R. 322). When both the postponement and the Motion were denied (R. 322, 87), he sought a month's delay in his trial to allow Mr. Rauh time to come to Hawaii and defend him (R. 323-326). All requests to postpone the trial were denied despite the fact that appellant had himself expedited proceedings by several months by waiving grand jury indictment (R. 321) and despite the Government's lack of interest in expediting it (R. 320, 322).

The trial took place August 25 and 26 (R. 174-302). Despite the fact that appellant had discharged Mr. Miho (who had never been retained for the trial in the first place), the District Judge insisted that Mr. Miho try the case and refused requests by appellant to defend himself (R. 160-162) or even to address the Court (R. 177, 178-180, 183, 185, 202,

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[2] The full factual details concerning the matter of counsel are not set forth at this point in the brief since it is deemed more convenient for the Court to consider them in connection with the argument concerning the denial of counsel. See Point V, pp. 68 to 77 *infra*.

280). After a perfunctory trial at which none of the issues presented in this brief were pressed,[3] appellant was convicted (R. 299). A Motion for Judgment of Acquittal or for a New Trial was promptly filed (R. 304) and this motion came on to be heard on September 25 (R. 328). Mr. Rauh appeared for appellant in support of the Motion for Acquittal or for a New Trial; the motion was denied (R. 411). The following day appellant was sentenced to jail for a period of two years, with provision for suspension of the sentence and placement on probation as to the last eighteen months (R. 436). The jail sentence was imposed despite the fact that appellant had never before committed as much as a traffic violation (R. 427) and despite a recommendation by the Atomic Energy Commission for leniency (R. 429, 431-432). This appeal followed.

Specification of Errors

The United States District Court for the District of Hawaii erred:

(1) In holding that Section 161(i) authorized the Atomic Energy Commission to issue a regulation barring United States citizens from entering the Pacific nuclear testing zone covering 390,000 square miles of the high seas.

(2) In failing to hold that Section 161(i), if construed to authorize the Commission to issue a regulation barring United States citizens from the testing zone under pain of severe criminal penalties, is too vague and indefinite to satisfy constitutional requirements.

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[3] It is true that some of these issues were raised by the Motion to Dismiss before trial, but when the District Court refused a postponement so that Mr. Rauh could argue the Motion to Dismiss and then denied the Motion, Mr. Miho apparently dropped all of these matters instead of seeking to raise them with an adequate factual basis at the trial (R. 174-302). All the issues were raised by Mr. Rauh in his argument in support of the Motion for Judgment of Acquittal or Motion for New Trial (R. 329-411) and are properly before this Court.

(3) In failing to hold that the Pacific nuclear tests and the regulation under which appellant was convicted violate international commitments of the United States.

(4) In failing to hold that appellant was deprived of First and Fifth Amendment rights under the Commission regulation which restrains peaceable protest and freedom of movement and which was adopted without the requisite notice and opportunity for hearing.

(5) In denying appellant his right under the Sixth Amendment to be defended by the counsel of his choice.

Summary of Argument

I

Congress did not authorize the Commission's trepass regulation of April 11, 1958. The Government's reliance upon subclause (3) of Section 161(i) of the Atomic Energy Act as its authority for the contested regulation is totally misplaced.

Subclause (3) of Section 161(i), read in the context of the Atomic Energy Act, did not authorize the issuance of the contested regulation. On its face this subclause provides only for regulations controlling activities carried on under the atomic energy program and Congress was in no sense utilizing this subclause to regulate the activities of strangers to the atomic energy program, such as one exercising his common right of travel upon the high seas. Closer examination reveals that subclause (3) is even narrower than this *prima facie* interpretation would suggest; the key words in the text, when given their plain meaning in the context of the Act, demonstrate that this subclause does not pertain even to the Commission's own weapon testing. The words "activity authorized pursuant to this Act" refer to activity of Commission licensees, not of the Commission itself, and therefore have nothing whatever to do

with its nuclear tests. Likewise the word "facilities" refers to production and utilization facilities, not to weapons or weapon tests. Moreover, the regulation did not attempt to govern "design, location and operation" of facilities. Subclause (3) was clearly intended to cover the design, location and operation of production and utilization facilities licensed by the Commission to carry out the provisions of the Act and nothing could have been farther from the minds of the legislators than the idea that this provision would cover total strangers to the atomic energy program navigating the high seas.

The enactment of a separate provision granting the Commission authority to prevent "trespass" evidences a clear Congressional intent to exclude such authority from the terms of Section 161(i). Whatever authority the Commission possesses to prevent "trespass" is found not in Section 161(i) but in Section 229 which is not involved in the present case. Not only does this separate "trespass" provision in Section 229 demonstrate that Section 161(i) includes no authority as to such matters, but the minor penalty provided for a violation of the separate "trespass" section is so at variance with the severe penalties for violations under Section 161(i) as to render incomprehensible the claim that 161(i) applies to anything resembling a trespass on areas under Commission control.

Furthermore, the Commission's own prior administrative interpretations of Section 161(i) support appellant's construction. Indeed, until the prohibitory regulation of April 11, 1958, the Commission had never before in its 12-year history of administration and weapon testing undertaken to issue such a regulation. The few regulations issued under 161(i) all related to activities of licensees and other persons acting under Commission authorization and regu-

lation and were not remotely connected with either nuclear tests or movement on the high seas.

II

Section 161(i), as interpreted by the Government, is constitutionally too vague and indefinite to sustain the attempted criminal regulation. The Government would have this Court read 161(i) to mean the same thing as 161(q), which grants the Commission catch-all authority to "make, promulgate, issue, rescind and amend such rules and regulations as may be necessary to carry out the purposes of this Act." But Congress expressly refrained from making violations of regulations issued under Section 161(q) punishable by criminal sanctions. For the Court now to read 161(i) in terms as broad as 161(q) would be to nullify the very Congressional restraint evidenced in refusing to place criminal sanctions behind vague statutory authorization.

As construed by the Government, Section 161(i) is too vague to sustain a criminal regulation for it would permit regulations "to govern any activity authorized pursuant to this Act . . . in order to protect health and to minimize danger to life or property." "Men of common intelligence" (see *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453) could not have determined whether this vague subclause authorized a regulation prohibiting American citizens from entering 390,000 square miles of the high seas. Moreover, all apart from the Fifth and Sixth Amendments and even if the regulation could be deemed to cure statutory vagueness, the vague delegation of criminal regulatory authority raises serious constitutional issues under the doctrine of separation of powers. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388; *Schechter Corp.* v. *United States,* 295 U.S.

495. Particularly where the administrative regulation would create a novel and extraordinary crime, as in this case, the delegation of authority to do so must be clear and definite. *Fahey* v. *Mallonee,* 332 U.S. 245, 249, 250.

III

The Pacific nuclear tests and the regulation under which appellant was convicted violate international commitments of the United States. The tests cause world-wide contamination contrary to legal commitments of the United States under the United Nations Charter. Furthermore, the removal of the Marshall Islanders and the destruction of their lands and resources violate the United States obligations under the Trusteeship Agreement for the Trust Territory of the Marshall Islands. Moreover, the closing off from ocean traffic of 390,000 square miles of the Pacific is a massive invasion of the international freedom of the high seas which the United States is committed to observe.

Nothing in the Atomic Energy Act sufficiently evidences Congressional intent to violate international commitments so as to authorize the Pacific nuclear tests or the contested regulation. The courts will not lightly assume that Congress has effected a unilateral renunciation of solemn international obligations of the United States; the abrogation of international commitments requires explicit statutory language whether such commitments be under recognized international law or treaty. Certainly in the absence of an explicit Congressional declaration, every presumption should be indulged against finding within the Atomic Energy Act authorization for prohibitory regulations incidental to nuclear tests which subject the population of the world to radiation-induced illness, which violate our treaty commitments to the Marshall Islanders and which entail massive infringement upon the freedom of the high seas.

IV

Appellant was deprived of First and Fifth Amendment rights under the Commission regulation which restrains peaceable protest and freedom of movement and which was adopted without the requisite notice and opportunity for hearing.

As the Supreme Court so recently held in *Kent* v. *Dulles*, 357 U.S. 116, the right to travel is a part of the "liberty" of the citizen protected by the due process clause of the Fifth Amendment. The contested regulation constitutes a deliberate restriction by the Commission upon the right of a small group of protestors to sail the high seas, assuming for themselves the risk of contamination danger. We suggest to the Court that, as in the *Kent* case, it refrain from passing upon this serious constitutional issue by giving the statute a reasonable construction excluding the power to issue regulations restricting freedom of travel on the high seas.

The rule of avoidance of constitutional issues is doubly applicable here, for the Commission's regulation infringes upon appellant's freedom of protest under the First Amendment as directly as it does upon his freedom of movement under the Fifth. Freedom of protest is not an empty right to be exercised by ineffective intellectual conversation only; it is a substantial right that may be exercised, as here, in its most dramatic and attention-getting manner. This is especially true in the instant case where the Commission had one purpose and one purpose only behind its reguation—to prevent the very type of protest appellant sought to make.

The contested regulation violates the due process clause of the Fifth Amendment because issued without notice or hearing. Where a proposed rule affects a particular identifiable group as distinct from the public at large, the constitutional requirement of notice and hearing has been held

to apply. Since the Commission was fully aware of the mere handful of people who would protest its action, we cannot conceive of a regulation more particular in its application to an easily identifiable group. Moreover, in the light of the Commission's knowledge that its regulation had immediate impact only upon such a handful of persons, the promulgation of the regulation was the exercise of an "adjudicatory" rather than a "legislative" function. Thus the Commission's failure to afford the few persons affected by its proposed regulation an opportunity to be heard prior to its promulgation renders the regulation defective under the due process guarantee of the Fifth Amendment.

V

Appellant was denied his right under the Sixth Amendment to the Constitution to be defender by his chosen counsel. He retained a local counsel, Mr. Katsugo Miho, not to undertake his defense, but only to handle preliminary matters until appellant could obtain mainland counsel qualified to handle a case involving statutory and constitutional issues of the first magnitude. At the first opportunity appellant went to the mainland and retained mainland counsel, Mr. Joseph L. Rauh, Jr., to represent him. The District Judge refused appellant a reasonable delay so that Mr. Rauh could come to Hawaii and represent him and forced Mr. Miho to represent appellant even after the latter had discharged Mr. Miho and had requested the right to represent himself at the trial. The Judge took this unusual action despite the fact that he had authorized appellant's trip to the mainland to obtain counsel, despite the fact that appellant had himself expedited the trial by waiving grand jury indictment, despite the fact that the Government had acquiesced in a reasonable postponement, and despite the fact that there is no compar-

able case of speed in recent months in the Hawaii District Court.

As the Court was repeatedly informed prior to trial, Mr. Miho, whom the Court ordered to defend appellant at the trial, had never been retained by appellant for that purpose and had previously been dismissed as his attorney for any purpose whatever. Mr. Miho's representation of appellant at the trial clearly did not meet the Sixth Amendment's requirement of effective assistance of counsel nor the Sixth Amendment's guarantee of assistance of chosen counsel. Furthermore, it was totally arbitrary and capricious and a clear violation of appellant's Sixth Amendment rights to deny him the right to represent himself at the trial and to force him to accept representation by an attorney he did not desire.

ARGUMENT

I

Congress Did Not Authorize the Commission's "Trespass" Regulation of April 11, 1958

The Commission regulation (see p. 78, *infra*) prohibiting American citizens and others from entering the 390,000 square-mile "Danger Area" of the Pacific high seas, without the express approval of "appropriate officials of the Atomic Energy Commission or the Department of Defense", was issued under the purported authority of Section 161(i) of the Atomic Energy Act (68 Stat. 948; 42 U.S.C. § 2201(i)). The criminal information asserts the same statutory authority for the regulation.

Section 161(i) provides:

> General Provisions.—In the performance of its functions the Commission is authorized to—
>
> * * * * *
>
> (i) prescribe such regulations or orders as it may

> deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this Act, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 53 or produced by any person in connection with any activity authorized pursuant to this Act, and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;''

In issuing the contested regulation the Commission made no claim that it was for any of the purposes specified in subclause (1) or (2) of Section 161(i). It was not to protect Restricted Data, or to guard against loss or misuse of special nuclear material. The avowed purpose was ''to avoid any unnecessary delay or interruption'' of the Commission's atomic weapon tests in the Pacific and ''to protect the health and safety of the public''.[4]

Thus, if the Commission's regulation is to stand, it can do so only upon the basis of the authority contained in subclause (3). But, as we shall show, the language of the subsection, the adoption of a separate ''trespass'' provision, and the administrative practice under Section 161(i) all refute the broad interpretation asserted by the Government.

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[4] Similarly, Government counsel below placed his reliance as authority for the contested regulation upon subclause (3) (R. 387).

A. *Subclause (3) of Section 161(i) Read in the Context of the Entire Atomic Energy Act Did Not Authorize the Issuance of the Contested Regulation*

Subclause (3) authorizes the Commission to prescribe regulations:

> "to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;"

Even a cursory look at this provision makes it clear that in subclause (3), as in the preceding subclauses (1) and (2), Congress was in no sense regulating the activities of strangers to the atomic energy program, such as one exercising his common right of travel upon the high seas. On its face, this subclause provides only for regulations controlling activities carried on under that program. The very fact that 161(i) failed to reach those unconnected with the atomic energy program made it necessary later to enact a separate trespass provision (see Point B, *infra,* pp. 24 to 29); the trespass section, which reaches persons completely unconnected with the program, buttresses the interpretation, clear on the face of the statute, that subclause (3) was not intended to govern strangers to that program. What Congress sought to govern in subclause (3) were activities of those voluntarily engaged in the atomic energy program, not activities of utter strangers seeking to protest aspects of that program.

Closer examination reveals that subclause (3) is even narrower than the foregoing *prima facie* interpretation would suggest. The key words in the text, when given their plain meaning in the context of the Act, demonstrate

that subclause (3) does not pertain even to the Commission's own weapon testing.

We turn then to an examination of these key words. Is atomic weapon testing the type of "activity" authorized to be governed under subclause (3)? Are atomic weapons the type of "facilities" intended to be governed thereunder? Did this provision empower the Commission to restrict navigation on the high seas by individuals unconnected with any person, activity or facility authorized to partake in the atomic energy program?

Each and all of these basic questions must be answered in the negative. As will be shown, (i) the type of "activity" to be regulated under subclause (3) does not include Commission tests of atomic weapons, but only activities of persons authorized by the Commission under the Act to engage in other aspects of the atomic energy program; (ii) the "facilities" referred to are those capable of producing or utilizing special nuclear material and by statutory definition exclude atomic weapons; and (iii), even if such weapons could conceivably be deemed "facilities" within the meaning of Section 161(i), the contested regulation does not establish standards and restrictions "governing the design, location and operation" of the weapons being tested.

(i) *"Activity authorized pursuant to this Act" refers to activity of Commission licensees, not of the Commission itself.* There are several keys to the meaning of subclause (3). Foremost is its repetition of a phrase, common to all other parts of Section 161(i), substantively tying subclauses (1), (2) and (3) into a unified comprehensible pattern. All three parts contemplate regulations pertaining to an "activity authorized pursuant to this Act". The Act authorizes some activities to be performed by the Commission and some to be performed by others. Analysis will show that Section 161(i) does not pertain to activities as-

signed to the Commission, such as atomic weapon testing, but only to activities to be performed by others under Commission authorization and regulation.

Subclauses (1) and (2) permit regulations specifically affecting *persons* engaged in activities authorized under the Act. The Commission, however, is not a "person". Section 11(q) of the Act defining "person" expressly excludes the Commission (68 Stat. 922; 71 Stat. 576; 42 U.S.C. § 2014(q)). In light of this statutory definition, the activities to be regulated plainly do not include the Commission's nuclear testing activity in the military application of atomic energy under Section 91(a) (68 Stat. 936; 42 U.S.C. § 2121(a)).

The Act contemplates a variety of activities by "persons" authorized to participate in the atomic energy program. For example, Section 31(a) directs the Commission to make arrangements with public or private institutions or persons to conduct research and development activities (68 Stat. 927; 70 Stat. 1069; 42 U.S.C. § 2051(a)). Section 41(b) authorizes the Commission to make contracts with persons to produce special nuclear material (68 Stat. 928; 41 U.S.C. § 2061(b)). Sections 103 and 104 permit the Commission to license, for certain commercial, industrial, research and development purposes, facilities for the production or utilization of such material (68 Stat. 936, 937; 70 Stat. 1071; 42 U.S.C. §§ 2133 and 2134). Section 107 directs the Commission to issue licenses to individuals to operate various kinds of production and utilization facilities (68 Stat. 939; 42 U.S.C. § 2137).

But only the Commission and, with its authorization, the Department of Defense—with the express consent and direction of the President—may produce or possess atomic weapons (Secs. 91 and 92, 68 Stat. 936; 42 U.S.C. §§ 2121 and 2122). Thus the Act sharply distinguishes between ac-

tivities to be conducted by *persons* and those to be conducted by the Commission, alone or with the Department of Defense. Atomic weapon testing falls clearly in the latter category.

Subclause (1), as previously noted, permits regulations "to protect Restricted Data received by any *person* in connection with any *activity authorized pursuant to this Act*" (emphasis supplied). Regulations to protect Restricted Data within the Commission itself are contained or amply provided for elsewhere in the statute—for example, Sections 141-146, 161(k) and (q), 221-230 (68 Stat. 940-943; 70 Stat. 1071; 68 Stat. 948; 68 Stat. 958-959; 70 Stat. 1070; 42 U.S.C. §§ 2161-2166, 2201(k) and (q) 2271-2278(b)).

Subclause (2) permits regulations "to guard against the loss or diversion of any special nuclear material acquired by any *person pursuant to section 53* or produced by any *person* in connection with any *activity authorized pursuant to this Act,* and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security" (emphasis supplied). Here again the activities to be regulated are plainly not those of the Commission, but of others. Under Section 53 referred to in this provision the Commission may, for the purpose of facilitating certain extra-Commission research, development and other activities, issue licenses for the possession of special nuclear material and make such material available to qualified applicants (68 Stat. 930; 42 U.S.C. § 2073). Under Sections 103 and 104, as previously noted, the Commission may license production facilities for certain purposes, and under 31(a) make arrangements for research and development by private or public institutions or persons that may involve production of special nuclear material. Subclause (2) of Section 161(i) authorizes regulations to guard against the loss, diversion or improper use or dis-

position of such material so acquired or produced by any *person.*

In view of the clear import of subclauses (1) and (2), it will be seen that subclause (3), on which the contested regulation depends, falls into a logical pattern. Within the framework and limitations of Section 161(i) as a whole, this provision rounds out the Commission's authority to regulate certain activities of licensees, contractors and other *persons* authorized under the Act. Whereas subclauses (1) and (2) relate to safeguarding Restricted Data and special nuclear material available to such persons, in the interest of the common defense and security, subclause (3) aims at protecting health, life and property, particularly in regard to the design, location and operation of *facilities.* But in common with the preceding parts, it concerns "any activity authorized pursuant to this Act", and there is nothing to suggest that such activity is different in type from that referred to in subclauses (1) and (2) or that the same phrase in the same subsection is now intended to be suddenly so broadened as to encompass the Commission's own atomic weapon tests.

(ii) *"Facilities" refers to production and utilization facilities, not weapons or weapon test devices.* Other language of subclause (3) reinforces the conclusion that subclause (3), like the preceding parts, relates to activities authorized under the Act to be performed by licensees, contractors and other persons. While it does not employ the word "person", it refers to "facilities". This reference is neither accidental nor incidental. Since other parts of Section 161(i) contain no provision for standards to govern the design, location and operation of facilities used in licensed and authorized activities, subclause (3) serves to complement the other parts in this respect. It also complements Section 161(b), which provides for security and

safety standards to govern the possession and use of *materials,* but contains no reference to facilities (68 Stat. 948; 42 U.S.C. § 2201(b)).

The central phrase in subclause (3)—"including standards and restrictions governing the design, location and operation of facilities used in the conduct of such activity [i.e., activity authorized pursuant to this Act]"—clearly limits the scope of the subclause. Whether or not this phrase excludes everything not expressly enumerated therein,[5] it certainly excludes, under the doctrine of *ejusdem generis,* regulations entirely different in kind and unrelated to those specified in the "including" clause. This interpretation is buttressed by the fact that, if the "including" clause were no limitation upon the scope of subclause (3), the subclause would be too vague to support a regulation with criminal penalties. See Point II, *infra,* pp. 34 to 42. Thus the words of the "including" clause are vital to a proper understanding of the scope of subclause (3).

What then is meant by "facilities?" The Act defines and refers to two types of facility—"production facility" and "utilization facility". The former means a facility or important component part thereof capable of producing special nuclear material; by no stretch of imagination can this include an atomic weapon (Sec. 11(t), 68 Stat. 922; 71 Stat. 576; 42 U.S.C. § 2014(t)).[6] The latter means a facility or important component part thereof capable of making use of special nuclear material; but *the definition expressly excludes any atomic weapon, weapon prototype or weapon test device* (Secs. 11(aa) and 11(d); 68 Stat. 922; 71 Stat.

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[5] *"Expressio unius est exclusio alterius." See Sutherland, Statutory Construction,* 3rd ed., Vol. 2, Secs. 4915-4916 and cases cited.

[6] "Special nuclear material" is defined in the Act as plutonium, uranium enriched in the isotope 233 or 235, and any other material which the Commission determines to be special nuclear material (Sec. 11(y), 68 Stat. 922; 71 Stat. 576; 42 U.S.C. § 2014(y)).

576; 42 U.S.C. §§ 2014(aa) and 2014(d)). Thus the "facilities" whose design, location and operation can be regulated under Section 161(i)(3) do not include an atomic weapon, weapon prototype or weapon test device.

(iii) *The regulation did not attempt to govern "design, location and operation" of facilities.* Even if the term "facilities" could conceivably be deemed to include atomic weapons—which by definition it cannot—the contested regulation did not govern "the design, location and operation" of atomic weapons and this is all that subclause 3 permits to be regulated with respect to "facilities." The regulation set up no standards and restrictions governing the "design, location and operation" of anything; it purported to govern something quite different, to wit, movement and navigation on the high seas. Movement and navigation on the high seas are outside the ambit of the key words "facilities", "design, location and operation," and "activity authorized pursuant to this Act."

(iv) *Conclusion.* Subclause (3) of Section 161(i) has no pertinence whatever to the subject matter of the regulation at bar. On its face, it clearly excludes the regulation of activities of strangers to the atomic energy program. Moreover, the words "activity authorized pursuant to this Act", "design, location and operation," and "facilities", given their plain meaning in context, concern matters wholly different from those sought to be regulated in the contested prohibition. Subclause (3) was clearly intended to cover the design, location and operation of production and utilization facilities licensed by the Commission to carry out the provisions of the Act. Nothing could have been farther from the minds of the legislators than the idea that such a provision would one day be stretched to bar United States citizens, total strangers to the Atomic Energy program, from 390,000 square miles of open seas. Indeed, if the showing already made could leave any doubt on this score,

the separate "trespass" provision in the Act gives direct refutation to the claimed elasticity of subclause (3) of Section 161(i).

B. *The Enactment of a Separate Provision Granting the Commission Authority to Prevent "Trespass" Evidences a Clear Congressional Intent to Exclude Such Authority From the Terms of Section 161(i)*

Congress of course has not left the Commission powerless to exclude unauthorized persons from its facilities and weapon testing grounds. The authority which Congress granted for this purpose, however, is not contained in Section 161(i), as asserted by the Government, but is separately and expressly provided for in Section 229(a) (70 Stat. 1070; 42 U.S.C. § 2278a(a)). The latter provision, specially enacted to prevent trespasses, provides:

> "Sec. 229. Trespass Upon Commission Installations.—a. The Commission is *authorized to issue regulations relating to the entry upon* or carrying, transporting or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon *any facility, installation, or real property subject to the jurisdiction, administration, or in the custody of the Commission.* Every such regulation of the Commission shall be posted conspicuously at the location involved" (emphasis supplied).

This provision plainly delineates the Commission's authority to prohibit entry upon areas subject to Commission control. Its existence in a separate section explicitly devoted to this purpose compels the conclusion that the Commission's regulatory power in regard to trespass

upon areas subject to Commission control is contained exclusively in Section 229(a). By the same token it demonstrates again that Section 161(i) was never intended as a vehicle of regulatory power to exclude persons from Commission proving grounds or other places under Commission control.

(i) *Whatever authority the Commission possesses to prevent "trespass" is found not in Section 161(i) but in Section 229(a).* The original Act of 1946, although providing for various other types of regulation, did not contain the provisions now included in Section 161(i). Nor did it contain the "trespass" provision now found in Section 229(a). During consideration of the bills which led to the Act of 1954, the Commission requested passage of both sections.[7]

After eight years' experience with the program's administration and with atomic weapon testing, the Commission's requests in 1954 for *both* 161(i) *and* a "trespass" provision are highly significant to the statutory interpretation question in this case. For, if, as the Government now contends, Section 161(i) was sufficient authority to prohibit entry upon a huge area of the high seas extending far beyond the Eniwetok proving grounds, it certainly would have been sufficient, without more, to prohibit unauthorized entry upon the proving grounds themselves or any other installation or property within the jurisdiction or administration of the Commission. The 1954 request for a "trespass" section *in addition* to Section 161(i) refutes the contention that 161(i) was sufficient authority for the purpose now asserted.

The 1954 Act added Section 161(i) but not the trespass section to the statute. The latter, now Section 229(a),

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[7] Hearings before Joint Committee on Atomic Energy on S. 3323 and H. R. 8862, 83rd Cong., 2nd Sess., pp. 562-563, 601, 608, 611-612, 670.

was not added until two years later in 1956, along with some 13 other amendments requested by the Commission.[8] Congressional enactment of the trespass provision two years after 161(i) was on the books is even more significant than the Commission's request therefor in 1954. For, if 161(i) is sufficient authority to prohibit entry upon the high seas, Section 229(a), providing for more limited prohibitions, would have been superfluous. It cannot be presumed that, in adding 229(a) in 1956, Congress enacted an unnecessary and superfluous statute. *United States* v. *Menasche,* 348 U.S. 528, 538-9; *Sutherland Statutory Construction,* 3rd Ed., Vol. 2, Sec. 4705 and cases cited; *Kent's Comm.* (13th ed., 1884) 462. On the contrary, the only conclusion that can reasonably be drawn is that no authority has ever resided in Section 161(i) to regulate trespasses on areas under Commission control and that whatever "trespass" authority Congress deemed necessary to delegate for this purpose is contained exclusively in Section 229(a).[9]

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[8] Pub. Law 1006, 84th Cong., 2nd Sess., chap. 1015, sec. 6, 70 Stat. 1070. See 102 Cong. Rec., 84th Cong., 2nd Sess., p. 13255.

[9] What little legislative history we could find on Section 161(i), other than in relation to the trespass section, is entirely consistent with apellant's interpretation.

In the hearings on the 1954 bill before the Joint Committee on Atomic Energy, Commissioner Campbell of the Atomic Energy Commission explained Section 161(i) as an integrated unit, with all its provisions having a common denominator in terms of "activities authorized pursuant to the Act"; and he made no suggestion that this key phrase was intended to include the Commission's own weapon testing. He testified:

> "Section 161(i) expressly gives the Commission authority to prescribe enforcible regulations and orders to protect the security of information and of materials, and to provide additional health and safety protection in connection with any activities authorized pursuant to the Act" (Hearings before Joint Comm. On Atomic Energy on S. 3323 and H. R. 8862, 83rd Cong. 2nd Sess., p. 601)

The only other witness who addressed himself to the provisions in question expressed the understanding, never disputed by any member

It is, of course, unnecessary to determine whether Section 229 would have supported the contested regulation, had the Commission sought to base it upon that provision of the Atomic Energy Act. The Commission did not do so; it rested on 161(i) alone. The Government likewise based its information against appellant solely upon 161(i) and in argument below relied exclusively upon that section. Furthermore, the penalty limitations of Section 229, as we shall show, would have precluded any prison sentence such as was imposed on appellant. For present purposes, it is enough that, to the extent the Commission is authorized to promulgate regulations against trespass into areas of its control and jurisdiction, authority is found only in provisions of the Act other than Section 161(i) here involved.

(ii) *The comparative penalties under Section 229 and Section 223.* Not only does the separate trespass provision in Section 229 demonstrate that Section 161(i) includes no authority regarding trespass, but the minor penalty provided for a violation of the trespass section is so at variance with the severe penalties for violations under Section 161(i) as to render incomprehensible the claim that 161(i) applies to anything resembling a trespass on areas under Commission control.

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of the Committee or the Congress, that they pertain to the regulation of "licensees". Mr. William A. Steiger, of the National Association of Manufacturers, testified in pertinent part as follows:

> ". . . This Chapter authorizes the Commission to do a number of things including the establishment of standards of safety for licensees . . ." (*Ibid.*, p. 465)

The Joint Committee report on the measure was consistent with these interpretations. It said in pertinent part:

> "Section 161 permits the Commission . . . to prescribe regulations to protect restricted data, to guard against the loss or diversion of special nuclear material, and to govern activities authorized pursuant to the bill, including health and safety regulations; . . ." (S. Rep. 1699, 83rd Cong., 2nd Sess., on S. 3690, p. 26).

For a violation of a regulation issued under 161(i), where there is no intent to injure the United States, Section 223 stipulates punishment by "a fine of not more than $5,000 or by imprisonment for not more than two years, or both" (68 Stat. 958; 42 U.S.C. § 2273).[10] Under this section appellant was sentenced to two years' imprisonment, with provision for suspension of the sentence and placement on probation as to the last 18 months. For a violation of a trespass regulation issued under 229(a), where there is no fence, wall, or other structural barrier, Section 229(b) provides for no imprisonment whatever and only "a fine of not more than $1,000" (70 Stat. 1070; 42 U.S.C. § 2278a (b)).[11]

Thus, if appellant had sailed into Eniwetok itself with a boatload of dynamite and had been prosecuted and convicted under the trespass section, he would have been subject to no jail sentence whatever and no greater fine than $1,000. Yet, under the loose interpretation of 161(i) indulged by the Government and the court below, we have the incongruity of a two-year sentence for merely entering the 390,000 square-mile prohibited area of the high seas hundreds of miles from Eniwetok. This anomalous result alone is refutation of the Government's elastic claim of authority under 161(i). Cf. *Buzzard* v. *Commonwealth*, 134 Va. 641, 652-655 (1922).

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[10] Where there is intent to injure the United States or advantage a foreign nation, the offense is punishable under 223 by "a fine of not more than $20,000 or by imprisonment for not more than twenty years, or both."

[11] Where the installation is enclosed by a fence or wall, etc., Sec. 229(c) imposes more severe punishment, but still less than for a violation of regulations under 161(i)—to wit, "a fine of not to exceed $5,000" or "imprisonment for not more than one year, or both" (70 Stat. 1070; 42 U.S.C. § 2278a(c). Of course where sabotage or espionage is involved, other statutes apply, and the penalties are extremely severe—for example, 62 Stat. 799; 18 U.S.C. § 2153.

This wide disparity in punishment supports appellant's construction of Section 161(i) and adds still more weight to appellant's interpretation of the statutory scheme. If 161(i) relates, as appellant contends, to activities of licensees and other persons participating in the atomic energy program under Commission authorization and regulation, it is important, in view of the risks involved in such activities, to provide stiff penalties for violations of regulations governing: (1) protection of restricted data received by such persons, (2) prevention of loss or misuse of special nuclear material acquired or produced by such persons, and (3) assurance of safe and proper design, location and operation of facilities used by such persons. On the other hand, trespasses on the Commission's own well guarded installations would hardly warrant such stiff penalties. As to such trespasses, particularly where the security factor is so slight that the installation is not even enclosed by a fence or wall, there is obviously less risk and less need for severe deterrent punishment.

In apparent recognition of these and perhaps other distinctions, Congress imposed sterner penalties for wilfully errant licensees entrusted with atomic energy activities than for strangers to the program whose sole offense is trespass upon a Commission installation. The existence of the separate "trespass" provision in Section 229, with lesser penalties appropriate to a simple trespass offense, and the legislative history of 161(i) in relation to the trespass provision, all refute the claimed broad authority of Section 161(i).

C. *The Commission's Prior Administrative Interpretations of Section 161(i) Support Appellant's Contention*

Until the prohibitory regulation of April 11, 1958, the Commission had never before in its 12-year history of

administration and weapon testing undertaken to issue such a regulation, either under Section 161(i) of the 1954 Act or any provision of the original Act or its amendments.

The Commission has conducted numerous tests not only at the Eniwetok but also at the Nevada proving grounds, where the need "to protect the health and safety of the public" is obviously more relevant and acute. Yet the Commission has never invoked 161(i) to protect public safety in connection with any of its domestic tests.

A number of Commission regulations have been rested on the authority of Section 161 generally (containing 18 sub-sections), but in only four instances, as far as we can find, has the Commission previously relied specifically on sub-section (i). In none of these four instances did the regulation pertain to weapon tests. They all related to activities of licensees and other persons acting under Commission authorization and regulation:

(i) Part 95 of the Commission Regulations, issued February 2, 1956, is predicated on Section 161(i) and concerns "Safeguarding of Restricted Data"; it expressly applies only to "persons who receive access to Restricted Data under an Access Permit" (Sec. 95.2; 21 FR 718).

(ii) Part 71 of the Commission Regulations, published September 21, 1957, is also predicated on Section 161(i) and consists of "Regulations To Protect Against Accidental Conditions Of Criticality In The Shipment Of Special Nuclear Material"; it similarly applies only to "persons licensed to receive, possess, use or transfer special nuclear material" (Sec. 71.2; 22 FR 7540).

(iii) In Part 50, governing "Licensing Of Production And Utilization Facilities", published January 18,

1956, Section 50.54(i) is rested specifically on Section 161(i); it provides: "The licensee shall not permit the manipulation of the controls of any production or utilization facility by anyone who is not a licensed operator as provided in Part 55 of this Chapter" (21 FR 355).

(iv) In Part 55, governing "Operators' Licenses", published January 3, 1956, Section 55.2(b) is likewise rested specifically on Section 161(i); it provides: "No individual shall manipulate the controls of any facility licensed pursuant to Part 50 of this chapter without a valid license issued pursuant to the regulations in this part" (21 FR 6).

Thus in all previous cases where the Commission invoked Section 161(i) as its authority, the regulations pertained to activities of licensees and other persons authorized under the Act to engage in some part of the atomic energy program. In no case did the Commission interpret Section 161(i) as a source of power to regulate its own weapon testing activities or to regulate citizens or others unconnected with any person, activity or facility in the atomic energy program.

D. *The Language of Section 161(i), the Separate Trespass Provision, and the Administrative Interpretations by the Commission, All Complement Each Other in Support of Appellant's Construction*

The contested regulation of April 11, 1958 was issued under the alleged authority of Section 161(i) of the Act; this was the basis on which appellant was convicted and sentenced. We have shown, however, that 161(i) provided no authority whatever for the regulation. On its face, 161(i) clearly excludes the regulation of activities of stran-

gers to the atomic energy program. Going further and analyzing its key words in context, 161(i) confers regulatory powers on the Commission to govern activities of licensees, contractors and other persons authorized by the Act to participate in the atomic energy program under Commission supervision. Neither by its terms nor even by stretching its terms does 161(i) pertain to the Commission's own weapon tests or to citizens, such as appellant, who are unconnected with any person, activity or facility in the atomic energy program.

The conclusion that 161(i) provided no authority to prohibit entry into the high seas around Eniwetok is strongly reinforced by the fact that the statute contains an altogether different and separate provision prohibiting unauthorized entries into areas of Commission control. The separate penalty provision in Section 229 for violations of "trespass" regulations, imposing lesser penalties than those stipulated in Section 223 for violations of regulations issued under 161(i), confirms appellant's textual interpretation of 161(i).

In the past the Commission has itself recognized the narrow scope of Section 161(i). Its own prior administrative interpretations of 161(i) support the appellant's, not the Government's, contentions.

Thus, all accepted aids to statutory construction complement each other to exclude from the Commission's authority under Section 161(i) the power to issue the contested regulation. When narrowly construed, as Section 161(i) must be, it affords not even a color of the authority claimed in this case.

Here the Government invokes the criminal sanctions of Section 223 to punish appellant's disregard of the regulation. Accordingly, the Court must be guided by the ele-

mentary rule of strict construction; no vagueness or indefiniteness in the terms of 161(i) and no uncertainty as to the nature and extent of the regulatory power conferred upon the Commission can be exerted in favor of the prosecution against one accused of crime. *United States* v. *Wiltberger,* 5 Wheat. (18 U.S.) 76; *Sutherland Statutory Construction, supra,* Vol. 3, Sec. 5604 and cases cited.

Having in mind this axiom of statutory construction, can it be said that 161(i) empowered the Commission to make it a crime to sail into or enter a vast area of the high seas hundreds of miles from Eniwetok? Did it empower the Commission to make it a crime to disregard an edict prohibiting such navigation or movement? Emphatically not. Narrowly construed, Section 161(i) cannot remotely be claimed to authorize the Commission to police navigation or movement on the high seas or to create any novel *extraterritorial* crime in this area of activity.[12] The section is silent on navigation or movement on the high seas. It deals only with regulatory power to govern "any activity authorized pursuant to this Act". If it is not clear, as appellant contends, that this phrase applies only to activities of licensees, contractors and other persons authorized to participate in the atomic energy program, certainly it is even less clear that it pertains to the Commission's own weapon testing or to the travel of strangers to the Commission's program. If 161(i) could be deemed to have any pertinence whatever to such matters, the most that could be said in this regard is that the section is indefinite, ambiguous and vague. We turn now to the issue of vagueness.

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[12] See p. 58n., *infra.*

II

Section 161(i), as Interpreted by the Government, Is Constitutionally too Vague and Indefinite to Sustain the Attempted Criminal Regulation

The prosecution, conviction and sentence below were based on Section 223 of the Act (68 Stat. 958; 42 U.S.C. § 2273) which provides:

> "Sec. 223. Violation of Sections Generally.—Whoever willfully violates, attempts to violate, or conspires to violate, any provision of this Act for which no penalty is specifically provided or of any regulation or order prescribed or issued under section 65 or subsections 161b., i., or p. shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both, except that whoever commits such an offense with intent to injure the United States or with intent to secure an advantage to any foreign nation, shall, upon conviction thereof, be punished by a fine of not more than $20,000 or by imprisonment for not more than twenty years, or both."

The most noteworthy thing about Section 223 is the care with which Congress limited the areas in which the Commission may promulgate regulations punishable by criminal sanctions. Thus, no criminal sanctions attach to violations of regulations issued under Section 161(q) which grants the Commission catch-all authority to "make, promulgate, issue, rescind and amend such rules and regulations as may be necessary to carry out the purposes of this Act" (68 Stat. 948; 42 U.S.C. § 2201(q)). This omission from penal Section 223 of any reference to regulations under 161(q) explains, of course, why the contested regulation was predi-

cated upon the authority of 161(i) rather than 161(q). But, as we shall show, what the Government is trying to do here is to rewrite Section 161(i) to give it as broad a scope as 161(q), which Congress deemed too broad to support criminal sanctions.[13]

(i) *Legislative history of 161(q) demonstrates Congressional adherence to constitutional requirements.* An atomic energy bill in 1945, a year before Congress passed the original Act, included broad power to issue regulations, similar in scope to the power now contained in 161(q) (H.R. 4566, 79th Cong., 1st Sess., Sec. 5(a)(3)). A minority report of the House Military Affairs Committee complained that, in light of the provision for criminal enforcement, the authority was so unlimited as to involve a serious constitutional question (H. Rep. 1186, Part 2, 79th Cong., 1st Sess., pp. 3-6). When Congress subsequently passed the original Act of 1946, it included no such broad regulatory authority and confined criminal penalties to violations of express statutory prohibitions and of regulations issued under specified limited delegations (Sec. 16(b) of the 1946 Act, Pub. Law 585, 79th Cong., Ch. 724, 2nd Sess.; 60 Stat. 773).

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[13] The omission of Section 161(q) from Section 223 is not the only evidence of Congressional intent to narrow the areas in which the Commission could make conduct criminal by the issuance of regulations. Congress was very careful to limit the criminal penalties to those types of regulations which are of special significance to the statutory scheme of a supervised atomic energy program. Section 223 attaches such penalties only when the regulations are issued under "section 65 or subsections 161(b), (i), or (p)." Section 65 provides for regulations requiring reports with respect to the possession, extraction and handling of source material, that is, uranium, thorium, etc. (68 Stat. 933, 922; 71 Stat. 576; 42 U.S.C. §§ 2095 and 2014(x)). Section 161(b) provides for security and safety regulations governing possession and use of special nuclear material, source material and byproduct material (68 Stat. 948, 922; 71 Stat. 576; 42 U.S.C. §§ 2201(b) and 2014(y), (x), (e)). Section 161(p) provides for regulations covering reports, records and inspection of licensed activities and contracted research activities (68 Stat. 948; 42 U.S.C. § 2201(p)).

The broad catch-all regulatory power now contained in Section 161(q) was added by an amendment in 1953, then designated as subsection 10 of Section 12(a) of the Act (67 Stat. 241; 42 U.S.C. § 1812). But at the same time Congress was careful not to enlarge the penal section (then designated Section 16(b) of the Act) in any way that might seem to authorize criminal enforcement of regulations issued under the new, but vague, delegation of power (S. Rep. 603, 83rd Cong., 1st Sess., p. 4). In presenting the 1953 measure for a floor vote, Senator Hickenlooper, in charge of the measure, emphasized:

> "Since the criminal provisions of the Atomic Energy Act do not apply to infractions of general rules and regulations, this section would not enlarge any powers of the Atomic Energy Commission to issue rules and regulations which would subject violators thereof to criminal punishment" (99 Cong. Rec. 9226, 83rd Cong., 1st Sess.).

In 1954, when the Joint Committee on Atomic Energy was considering measures which evolved into the 1954 Act, a committee print of May 21, 1954 contained a version of the penal section (Section 223) which would punish violations of "any regulation or order prescribed or issued under Sections 65 or 161." In this form, without discriminating among the various subsections of Section 161, it was so broad that it seemed to provide for criminal enforcement of regulations issued under any or all subsections, including the vague catch-all subsection (q). The Department of Justice, however, was alert to the constitutional infirmity that lurked in this version. Mr. Nathan Siegel, of the Department's Office of Legal Counsel, testified before the Joint Committee that:

> "the men who try these cases feel that there would be more teeth in an act and a case is less likely to be re-

versed after conviction if the language is explicit prohibitory language" (Hearings before Joint Comm. on Atomic Energy on S. 3323 and H.R. 8862, 83rd Cong., 2nd Sess., p. 725; see also p. 707).

Mr. J. Lee Rankin, then Assistant Attorney General, testified at p. 726:

> "Section 223 is the same problem in regard to prohibitory language, as well as the sanctions, and we will submit some language in regard to that if you like."

In the version of the penalty Section 223 that was subsequently passed in the Act of 1954, Congress was careful to omit any reference to violations of regulations under the catch-all subsection (q) of Section 161. As to violations of Commission regulations, Congress attached criminal penalties in Section 223 only where the regulation is "issued under section 65 or subsection 161b., i., or p." Thus Congress recognized and sought to avoid the constitutional infirmity of any attempted criminal enforcement of regulations under 161(q).[14] For the Court now to read Section 161(i) in terms as broad as 161(q) would be to nullify the very Congressional restraint evidenced in refusing to place criminal sanctions behind vague statutory authorization.

(ii) *As construed by the Government, Section 161(i) is too vague to sustain the regulation and the criminal conviction below.* Section 161(i), if construed as loosely as the

[14] In the past, the Commission itself has been sensitive to the constitutional importance of specific legislative authority for any regulation which is to be criminally enforcible. For example, in requesting a clear-cut "trespass" provision with criminal penalties, Commissioner Zuckert pointed out to the Joint Committee in 1954 that "it would be quite useful in furnishing a *sound legal basis* for *prosecuting* trespasses on Commission property in the absence of any Federal trespass statute of general applicability" (emphasis supplied). (Hearings before Joint Comm. on Atomic Energy on S. 3323 and H. R. 8862, 83rd Cong., 2nd Sess., Part 2, p. 611).

Government urges, would be subject to the same basic infirmity as an attempted criminal enforcement of a regulation issued under 161(q). Appellant has shown that, when subclause (3) is considered in its entirety and in the context of the preceding parts of 161(i), the conclusion is inescapable that it has no application whatever to nuclear weapon tests or to citizens such as appellant who are unconnected with any person, activity or facility authorized to partake in the atomic energy program. The Government would apparently have the courts read subclause (3) as if it were dissociated from the rest of 161(i) and, moreover, as if it did not contain the central phrase, "including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity . . ."

So edited, the subclause would permit regulations:

> to govern any activity authorized pursuant to this Act . . . in order to protect health and to minimize danger to life or property."

That the Government reads Section 161(i) as indicated and thus renders it as vague as 161(q) need not be left to speculation. The Government's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss in the court below contains the following statement (R. 28-29):

> "Thus, the powers granted the Commission to 'prescribe such regulations or orders as it may deem necessary * * * to protect restricted data,' or 'to govern any activity authorized pursuant to this Act * * * in order to protect health and to minimize danger to life or property,' or generally to 'make * * * such rules and regulations as may be necessary to carry out the purposes of this Act' (42 U.S.C. 2201(i) and (q)), all must be read as authorizing regulations equal in reach to the

statutory activities which they implement. A narrower reading would, in fact, contravene the plain language of the cited authorizations." (Omissions are the Government's.)

Even if the provision could be severed and truncated as the Government would have it, the result would not aid the prosecution. For its terms would then be no less vague and indefinite than those of the catch-all Section 161(q). Under the Fifth and Sixth Amendments, no criminal conviction for an alleged violation of a regulation issued under Section 161(i), as construed by the Government, could be constitutionally sustained. It is elementary that a vague and indefinite criminal statute—that is, one under whose terms "men of common intelligence must necessarily guess at its meaning and differ as to its application"—violates the due process clause of the Fifth Amendment and the due notice requirement of the Sixth Amendment. *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453. See also *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; *Connally* v. *General Construction Co.,* 269 U.S. 385; *Herndon* v. *Lowry,* 301 U.S. 242. The fact that the regulation may not of itself be vague and indefinite is no answer to the deficiencies of the statute under which the regulation is promulgated. Appellant may, of course, have been under no misconception as to what was prohibited by the Commission's regulation;[15] he certainly

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[15] Appellant does not claim that the prohibition of April 11, 1958 was itself indefinite, although some parts of the regulation were unquestionably vague and without intelligible standards (e.g., the regulation purported to sub-delegate to unspecified "officials" of the Department of Defense authority to grant or deny entry permission; it set no standards as to who could obtain permission and for what purpose; it provided for no hearing on requests for permission to enter). Appellant's claim is that 161(i), under which the regulation was purportedly issued, does not even remotely suggest any outlines of regulatory power that would encompass the sort of regulation, and along with it the special crime, which the Commission attempted to create.

could not have known from looking at the statute whether it authorized the Commission to issue the contested regulation. Specificity of a regulation cannot cure vagueness in its statutory predicate.

Moreover, all apart from the Fifth and Sixth Amendments and even if a regulation could be deemed to cure statutory vagueness, the vague delegation of criminal regulatory authority raises serious constitutional issues under the doctrine of separation of powers. The delegation to an administrative agency of legislative authority to make conduct criminal must be narrowly circumscribed in scope and with standards adequate to assure that the law-making function has not been surrendered. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388; *Schechter Corp.* v. *United States,* 295 U.S. 495. Particularly where the administrative regulation would create a novel and extraordinary crime, as in this case, the delegation of authority to do so must be clear and definite. In *Fahey* v. *Mallonee,* 332 U.S. 245, involving the question of constitutional vagueness in delegation of administrative regulatory power, Mr. Justice Jackson, speaking for the Court, explained the unconstitutionality of the statutes tested in *Panama Refining Co.* v. *Ryan, supra,* and *Schechter Corp.* v. *United States, supra:*

> "Both cases cited dealt with *delegation of a power to make federal crimes of acts that never had been such before* and to devise novel rules of law in a field in which there had been no settled law or custom. The latter case also involved delegation to private groups as well as to public authorities. Chief Justice Hughes emphasized these features, saying that the Act under examination was not merely to deal with practices 'which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of

established principles of law to particular instances of violation. . .' " (p. 249) (emphasis supplied).

And again, distinguishing between administrative power to appoint conservators for federal savings and loan associations and power to create innovations of criminal law, Mr. Justice Jackson wrote (p. 250):

> "It may be that explicit standards in the Home Owners Loan Act would have been a desirable assurance of responsible administration. But the provisions of the statute under attack are not penal provisions as in the case of *Lanzetta* v. *New Jersey,* 306 U.S. 451 or *United States* v. *Cohen Grocery Co.,* 255 U.S. 81. The provisions are regulatory . . . The remedies which are authorized are not new ones *unknown to existing law to be invented by the Board in exercise of a lawless range of power.* Banking is one of the longest regulated and most closely supervised of public callings . . . A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might *not be allowable to authorize creation of new crimes in uncharted fields*" (emphasis supplied).

We do not urge this Court to hold Section 161(i) unconstitutional. Congress made clear its awareness of constitutional requirements when it refused to place criminal sanctions behind the Commission's general regulatory authority under 161(q). We ask this Court to respect Congressional adherence to constitutional requirements and not read Section 161(i) as covering the same vague ground as 161(q). If, however, the Court should disagree with our conclusion as to Congressional intent and give 161(i) the broad interpretation for which the Government contends,

then clearly, under the authoritative decisions of the Supreme Court previously cited, 161(i) is too vague and indefinite to support appellant's criminal conviction.

III

The Pacific Nuclear Tests and the Regulation Under Which Appellant Was Convicted Violate International Commitments of the United States

In Point I we saw that the language of Section 161(i), the separate "trespass" section, and the administrative interpretations by the Commission, all complemented each other in support of a construction of this section excluding the authority to issue the contested regulation. In Point II we demonstrated that such construction was required because the broad interpretation for which the Government contends would render Section 161(i) too vague and indefinite to support a criminal conviction. We turn now to a third and most significant reason for appellant's construction of the statute—that a contrary construction would ascribe to Congress an intent to abrogate the international commitments of the United States.

It is a settled rule of statutory construction that Congress should not be presumed to have violated the international commitments of the nation whose laws it enacts. See pp. 55 to 58, *infra*. Judicial deference to the good faith of a coordinate branch of government requires that, in the absence of explicit statutory language, Congress will not be deemed to have abrogated our international commitments. In this Point III, we domonstrate first that the Pacific nuclear tests and the contested regulation promulgated in connection with those tests clearly violate the international commitments of the United States (see A, pp. 43 to 55, *infra*) and second that nothing in Section 161(i) or the Atomic Energy Act is sufficiently explicit to

warrant the interpretation that Congress thereby intended to sanction these violations of the international commitments of the United States (see B, pp. 55 to 58, *infra*).

A. *Violations of International Commitments*

The Commission's 1958 nuclear tests in the Pacific constituted a three-fold violation of this country's international commitments: 1) the world-wide contamination resulting from the testing violates this country's human rights commitments under the United Nations Charter; 2) the testing violates obligations undertaken by the United States under the Trusteeship Agreement for the Trust Territory of the Pacific Islands; and 3) the tests and the "trespass" regulation constitute unprecedented infringement of United States commitments to the doctrine of freedom of the seas.

(1) *The Tests Cause World-Wide Contamination Violating Solemn Commitments of the United States under the United Nations Charter*

By ratification of the Charter of the United Nations, the provisions thereof became the supreme law of the land under Article VI of the Constitution. One of the foremost areas in which the Charter of the United Nations imposes obligations upon the member nations is that of human rights. See Lauterpacht, *International Law and Human Rights* (1950); Quincy Wright, *National Courts and Human Rights,* 45 Am. J. Int'l L. 62. Under Article 55 of the Charter, for the purpose of creating "conditions of stability and well-being", member nations are pledged to promote "universal respect for, and observance of, human rights and fundamental freedoms,"[16] and "solutions of international economic, social, health, and related problems."

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[16] See *Oyama* v. *California,* 332 U.S. 633 (concurring opinions at 649-650; 673).

By Article 56 of the Charter, all member nations "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." As stated on April 18, 1949, by Mr. Benjamin V. Cohen, United States Representative at the Third General Assembly (Department of State Bull. XX, 1949, p. 556), "Under the Charter of the United Nations all the members of the United Nations . . . solemnly committed themselves to take joint and separate action in cooperation with the organization to promote universal respect for and observance of human rights and fundamental freedoms . . ."

The 1958 nuclear tests, which contributed materially to the ever increasing world-wide atomic pollution, are clearly contrary to our commitment to the "observance of human rights and fundamental freedoms."[17] The right to life and

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[17] Apart from the United Nations Charter commitments, atomic pollution may also be viewed as a violation of general international law. As stated by Professor Emanuel Margolis in *The Hydrogen Bomb Experiments and International Law,* 64 Yale L. J. 629, 641-42:

> "The injurious effects of the thermonuclear explosions may be viewed also within the juridical context of the responsibility of states to prevent pollution of international waters and air space. To date, concern over the problem of pollution of international waters has been restricted almost exclusively to pollution from the discharge of oil by ships. And, while international bodies have given the matter increasing attention over the past few decades, and various states have passed legislation aimed at ameliorating its wasteful and unsanitary after-effects, the nations thus far have been unsuccessful in their efforts to regulate pollution by general treaty or convention.
>
> Nevertheless, judicial tribunals have used general principles of law and equity to resolve disputes concerning pollution. Some of the leading cases on the subject are decisions of the United States Supreme Court in disputes between states of the union. In such cases the Court has established the following rule: a state may be enjoined from conduct which pollutes interstate waters, or waters flowing into a neighboring state, if it can be shown that the pollution and its effects are of sufficiently 'serious magnitude.'
>
> This same 'serious magnitude' test was recognized and applied

to a life free from grievous bodily injury and suffering are "human rights" of the first magnitude—there can be no question but that nuclear tests are causing world-wide atomic pollution which threatens the health and the lives of the people of all nations, those now living and generations yet unborn. This is the conclusion not only of scientists testifying at the 1957 hearings of the Joint Congressional Committee on Atomic Energy on "The Nature of Radioactive Fallout and Its Effects on Man," [18] but also of the "Report of the United Nations Scientific Committee on Effects of Atomic Radiation," in August 1958, to the 13th Session of the General Assembly.

The United Nations Report is the result of years of scientific study by United Nations experts on the effects of radiation. The firm conclusion of their study (at pp. 41-42) is that there arises "exposure of mankind to ionizing radiation . . . from environmental contamination due to nuclear explosions"; that "even the smallest amounts of radiation are liable to cause deleterious genetic, and perhaps also somatic, effects"; and that "both natural radiation and radiation from fallout involve the whole world population to a greater or lesser extent . . ." The report points out that:

> "Even a slow rise in the environmental radioactivity in the world, whether from weapon tests or any other

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as a rule of international law by an arbitral tribunal in the *Trail Smelter Case*. The United States received an indemnity award of $78,000 for damages to land, crops, and trees in the state of Washington from sulphur dioxide fumes emitted by a Canadian smelting company. The tribunal ruled that 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of *serious consequence* and the injury is established by clear and convincing evidence.' "

[18] See Joint Committee Print, 85th Congress, 1st Sess., "Summary-Analysis of Hearings May 27-29, and June 3-7, 1957 on the Nature of Radioactive Fallout and Its Effects on Man."

> sources, might eventually cause appreciable damage to large populations before it could be definitely identified as due to irradiation. Appearance and elimination of adverse genetic effects would be very slow; and, as the radioactive contamination accumulated, it might so act as to increase the likelihood of somatic injury in individuals due to the additional exposure. Such a situation requires that mankind proceed with great caution in view of a possible underestimation."

The report estimates the number of cases of leukemia which may ultimately occur from accumulated fallout engendered by nuclear testing prior to August, 1958. While doubt concerning the human radioactivity "threshold" precludes a firm minimum figure for leukemia cases, the report indicates that as a cumulative result of the nuclear tests prior to the 1958 tests, *150,000 leukemia cases may ultimately occur.*[19]

On these facts we deem it clear that the 1958 nuclear tests conducted by the Atomic Energy Commission in the Pacific were inconsistent with this country's United Nations commitment of observance of human rights and fundamental freedoms.[20]

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[19] In a study by Edward Teller and Albert L. Latter, *Our Nuclear Future* (1958), p. 119, it is stated that:

> "Per megaton of fission . . . perhaps 200 persons may get leukemia or bone cancer. This figure could actually be higher, possibly even a thousand or more persons per megaton."

Inasmuch as there have to date been 75 megatons of fission by virtue of nuclear detonations, according to Teller and Latter's figures, this means *a potential of 75,000 cases of leukemia or bone cancer as a result of testing to date.* Mr. Teller, of course, is the distinguished Consultant to the Atomic Energy Commission and America's foremost advocate of continued nuclear testing.

[20] In protesting against nuclear testing with its attendant world contamination, appellant shares the views of respected world leaders—those of neutral nations and our close allies—and indeed the 1956 Presidential nominee of the Democratic Party. See Freeman and Yaker, *Disarmament and Atomic Control*, 43 Cornell Law Quarterly 236, 255, n. 76.

(2) *The Removal of the Marshall Islanders and the Destruction of Their Lands and Resources Violate United States Obligations Under the Trusteeship Agreement for the Trust Territory of the Pacific Islands*

As a result of the Second World War, the United States obtained possession of certain islands in the Pacific formerly mandated to Japan. In 1947, the United States submitted to the Security Council of the United Nations, in accordance with Article 83 of the Charter, a proposed Trusteeship Agreement for these islands under which the United States would administer them in accordance with the terms of the Charter. On April 2, 1947, the proposed Trusteeship Agreement was approved by the Security Council. Thereafter, the Senate and the House of Representatives authorized the President of the United States to approve that Trusteeship Agreement on behalf of the United States. H. J. Res. 233, 61 Stat. 397. On July 18, 1947, the President approved the Agreement and it thereby became effective.

Under the Trusteeship Agreement the United States is designated as the administering authority, with full powers of administration, legislation and jurisdiction over the subject Territory. In discharging its obligations under the Agreement, the United States is required to act in accordance with the Charter of the United Nations, promoting development of the inhabitants towards self-government or independence. By the second section of Article 6 of the Agreement, it is decreed that the United States, as the administering authority, shall:

> "Promote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; *protect the inhabitants against the loss of their lands and re-*

sources; and improve the means of transportation and communication'' (emphasis supplied).

It is this section of the Trusteeship Agreement, guaranteeing the protection of the inhabitants against the loss of their lands and resources, which has been most clearly violated by the testing conducted by the Atomic Energy Commission in the Pacific Ocean.[21]

By virtue of the nuclear testing in the Pacific conducted by the Commission between 1946 and 1958, Marshall Islanders have been subjected to the loss of their homes and properties, and indeed, to bodily injury. Prior to the 1946 tests, 160 inhabitants of Bikini, which had been selected as a test site, were removed from the island, placed on Rongerik Atoll, and eventually relocated to Kili Island in the Southern Marshalls.[22] See Navy Department, Trust Terri-

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[21] As stated in the 1953 Annual Report of the High Commissioner of the Trust Territory of the Pacific Islands to the Secretary of the Interior (at p. 1):

> "The Agreement establishes the area as a strategic trusteeship in recognition of those geographic considerations which render its position in the Pacific of vital strategic concern to the United States and to the other nations of the free world in the inhibiting of resurgent aggression. The United States, as administering authority, occupies a privileged strategic position in the islands of the Trust Territory, but in return for that advantage it has voluntarily accepted certain serious obligations for the present and future welfare of the inhabitants."

[22] The Bikini people whose primary occupation was fishing were moved to Kili Island where there is no fishing for seven months of the year. Kili has since been called "the island of hungry people" (New York Times, June 28, 1954, p. 3, col. 5). The 1956 Annual Report of the High Commissioner of the Trust Territory of the Pacific Islands to the Secretary of the Interior discusses the need for

> ". . . assistance in orienting the former Eniwetok and Bikini residents in their respective new home islands of Ujelang and Kili, Marshall Islands District, where fishing and agriculture conditions are different from those to which they had been accustomed. A former district anthropologist for the Marshall Islands returned during the year,

tory of the Pacific Islands, 3 (1948); Petition from the Marshallese People Concerning the Pacific Islands, U. N. Doc. No. T/Pet. 10/28 (1954). Later, in connection with the selection in 1947 of Eniwetok Atoll in the Marshall Islands as an atomic proving ground, 145 inhabitants of that atoll were resettled on Ujelang Atoll. See AEC Press Release No. 70, December 1, 1947. On March 1, 1954, a nuclear detonation exposed 236 Marshallese to radiation and radiation illness on the islands of Rongelap, Rongerik and Utirik. See New York Times, March 12, 1954, p. 1, col. 1. Because Rongelap and Utirik Islands were rendered radioactive, the inhabitants of Utirik were removed temporarily to Kwajalein and the people of Rongelap were transferred to the Island of Ejit on Majuro Atoll. See 1954 Annual Report of the High Commissioner of the Trust Territory of the Pacific Islands to the Secretary of the Interior, p. 8. Thus, since 1946 the Pacific nuclear testing has necessitated the relocation, temporary or permanent, of a total of 541 Marshallese.

It is unnecessary to belabor the fact that the removal of the Marshall Islanders from their homes and properties because of the nuclear testing program is inconsistent with the United States' treaty obligation to "protect the inhabitants against the loss of their lands and resources." [23] Nor, notwithstanding the Government's contention below,

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and gave effective assistance in orienting these people in their new island homes. Among other things, a boat was procured especially for the Kili people, to aid them in carrying on subsistence agriculture at nearby islands" (p. 20).

[23] "Land means a great deal to the Marshallese. It means more than just a place where you can plant your food crops and build your houses; or a place where you can bury your dead. It is the very life of the people. Take away their land and their spirits go also." Petition from the Marshallese People Concerning the Pacific Islands, U. N. Doc. No. T/Pet. 10/28 (1954).

is it of significance that the Trusteeship Council of the United Nations has failed to condemn the tests despite the petition of Marshall Islanders in 1954 and 1956 for cessation of testing.[24] The Trusteeship Council is not authorized either under the Agreement or the United Nations Charter to alter or amend its terms or in any sense to waive a violation thereof.[25] "In carrying out its trusteeship functions, the Trusteeship Council . . . is limited to making recommendations to Members. It does not make binding decisions." Toussaint, *The Trusteeship System of the United Nations,* p. 174. The function of the Trusteeship Council is merely to assist the Security Council in carrying out its functions under the Charter, and this does not include functions regarding the Trust Agreement such as alteration, amendment or termination. *Id.,* p. 172. Only the Security Council can make binding determinations on the administration of a strategic area such as the Pacific Trust Territory. *Id.,* p. 222 *et seq.*

Whether the Trusteeship Council's action upon the request of the Marshall Islanders for discontinuance of the

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[24] See Trusteeship Council Resolution 1082, 15 July 1954; Trusteeship Council Resolution 1493, 29 March 1956. The Government's contention below that these resolutions "expressly approved nuclear tests in the Marshall Islands" (R. 31) would hardly seem justified merely upon the basis of a suggestion from the Trusteeship Council that precautions be taken "if the Administering Authority considers it necessary . . . to conduct further nuclear experiments in the Territory."

[25] The Trust Territory of the Pacific Islands is designated a "strategic area" and, under Article 83 of the United Nations Charter, "All functions of United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council." While it is prescribed that the Security Council shall "avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social and educational matters," this provides no authority for the Trusteeship Council either to approve or disapprove the actions of the administering authority.

tests be interpreted as simply a refusal to condemn the United States tests, or, along the lines of the Government's argument below, be interpreted as an approval of those tests, is of no significance in view of the limited authority of the Trusteeship Council. If the United States has violated its Trusteeship obligations towards the people of the Marshall Islands, as appears abundantly clear from what has been related, the Security Council and the Security Council alone has the power to waive that violation, and the Security Council has not been asked to take action and has taken no action in the matter. Thus, the deprivation of their home lands, to which the Marshall Islanders are subjected by the Pacific tests, is a continuing invasion of rights which the United States is committed to protect under its agreement with the United Nations.

(3) *The Closing Off From Ocean Traffic of 390,000 Square Miles of the Pacific Is a Massive Invasion of the International Freedom of the High Seas Which the United States Is Committed to Respect*

The appropriation, in connection with the Pacific nuclear tests, of 390,000 square miles of the Pacific Ocean and the promulgation of a regulation prohibiting entry into that area constitute a massive invasion of the international freedom of travel on the high seas.[26] Long before the found-

[26] This violation is fully and ably reviewed in two articles, *The Hydrogen Bomb Experiments and International Law*, by Emanuel Margolis, 64 Yale L. J. 629, and *The Hydrogen Bomb Tests in Perspective*, by Myres S. McDougal and Norbert A. Schlei, 64 Yale L. J. 648. It should be noted that, while the latter article generally defends the nuclear tests in the Pacific against claims of international violations, the article was written before the promulgation of the regulation here in issue and *explicitly reserves* the international law issue presented by such a regulation. Thus, the authors conclude, at p. 684, that atomic testing on the high seas by the United States in itself "offers no serious interference with the policies of promoting commercial navigation and fishing which underlie 'freedom of the seas,'" but they are careful to point out that testing alone "does

ing of the Republic, freedom of the seas had become a universally recognized guarantee of international law. See Margolis, *supra,* n. 26 at p. 632 et seq; McDougal and Schlei, *supra,* n. 26, at p. 661 et seq. Numerous declarations of the United States right down to the present time indicate the degree and continuity of its commitment to the principle that the high seas may be freely traversed by all persons without hindrance.

Thus, in the Seventh Principle of the Atlantic Charter of August 14, 1941 (55 Stat. 1603), constituting a declaration of principles between this country and the United Kingdom, the parties declared their commitment to a "peace" which "should enable all men to traverse the high seas and oceans without hindrance." On September 28, 1945 the President of the United States issued Proclamations Nos. 2667 and 2668 (59 Stat. 884 and 885) concerning United States policy "With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf" and "With Respect to Coastal Fisheries in Certain Areas of the High Seas." In both instances the proclamations specifically stated that by virtue of the matters therein, "the character as high seas" of the areas affected "and the right to their free and unimpeded navigation are in no way thus affected." [27] Indeed, at this very time the United States is predicating its arguments in the United States Supreme Court in the "tidelands" cases upon the traditional recognition and acceptance by the United States

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not offend against the subordinate policies against international friction *which are involved in claims to exercise police powers on the high seas. No ships are seized or condemned, nor is civil or criminal jurisdiction of any kind asserted*" (emphasis supplied).

[27] Early in 1958 Mr. Arthur Dean emphasized the historic commitment of the United States to the principle of freedom of the seas at the Conference on the Law of the Sea convened in Geneva under auspices of the United Nations. A Convention was formulated at this Conference concerning the freedom of the high seas, subject to the ratification of individual nations. See *Foreign Affairs,* October 1958, pp. 82-94.

of the principle that the waters beyond the three-mile limit are international in character. In the Brief for the United States in *United States* v. *Louisiana, Texas, Mississippi, Alabama and Florida,* No. 11, Original, Supreme Court of the United States, October Term, 1957, there is extensive documentation (pp. 59-102) of the historic commitment of the United States to the principle of freedom of the seas beyond the three-mile limit. In the words of the Solicitor General (p. 59):

> "The concept of the marginal belt of territorial water, subject to the sovereignty of a coastal nation, is an encroachment upon the general principle of freedom of the seas. Being firmly committed to freedom of the seas as a major premise of national policy (*United States* v. *California,* 332 U.S. 19, 34), the United States has always insisted that the width of the marginal belt of territorial waters which it would claim for itself or recognize for other nations must be held to a minimum."

In the words of Secretary of State Dulles, whose declarations the Solicitor General urges as binding upon the Supreme Court in the tidelands litigation:

> "From the outset, it [the United States] had adopted freedom of the seas as an axiom of its foreign policy. It rapidly perceived that, in order to give maximum effect to this policy, it must adhere strictly to the three-mile limit . . .
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> "Freedom of the seas continues to be essential to the national interests of the United States, particularly in matters of commerce, fishing and defense. Free sea lanes and air routes over the seas are essential to the maintenance of the pre-eminence of the United States in commercial shipping and air transport. Free seas

> are essential to the prosperity of its fishing industry. And it is its traditional concept of defense that the greater the freedom and the range of its warships and aircraft, the more effectively its security interests are protected. Compromise of the position of the United States on the three-mile limit would necessarily compromise, if not force abandonment, of its opposition to claims of foreign states to greater breadths of territorial waters, and in turn impair the protection of national interests which the policy of freedom of the seas is designed to achieve. It is no exaggeration to say that, in view of the serious attacks which are now being made upon the freedom of the seas in various parts of the world, the maintenance of the traditional three-mile policy is more than ever a matter of vital interest to the United States'' (Brief, pp. 345-346).

In the light of these declarations, it is incontestable that the United States has always been and remains today fully committed to the principle of the freedom of the high seas. Yet it can hardly be questioned that the appropriation for testing of a 390,000 square mile area of the Pacific Ocean, and the promulgation of a regulation prohibiting entry, is a massive intrusion upon the right of ''all men to traverse the high seas and oceans without hindrance.'' Indeed, the obvious nature of the violation is evidenced by the statement of the United States on November 12, 1952 (see 99 Cong. Rec. 4084-4085) protesting the claim of the Russian government asserting jurisdiction over a 12 nautical mile off-shore belt of waters:

> ''It is the view of my Government that the Soviet Union, in thus attempting to appropriate to its exclusive use and control a portion of the high seas, has manifested a willingness to deprive other states, with-

> out their consent, of rights under international law. Such conclusion is inescapable in the face of a territorial-waters policy whereunder the Soviet Union would supplant free and untrammeled navigation by all vessels and aircraft over water areas comprising a part of the high seas, with such controls as that Government might apply. The Government of the United States of America is not aware of any principle of international law which would support and justify such a policy."

If this be the correct view under international law of the appropriation of a 12 mile off-shore area by another nation, we would think that the same considerations would apply with no less vigor to the exclusive appropriation by an agency of the United States of over 390,000 square miles of the high seas.

B. *Nothing in the Atomic Energy Act Sufficiently Evidences Congressional Intent to Violate International Commitments so as to Authorize the Pacific Nuclear Tests and the Contested Regulation*

It is firmly settled that, in the absence of explicit statutory language, Congress will not be presumed to have authorized the abrogation of international commitments of the United States. The repeal of an international commitment requires an explicit statutory provision whether the commitment be under recognized international law (see *Murray* v. *Charming Betsy,* 2 Cranch 64, 118) or treaty (see *United States* v. *Payne,* 264 U.S. 446; *United States* v. *Lee Yen Tai,* 185 U.S. 213; *United States* v. *Gue Lim,* 176 U.S. 459).[28] The courts will not lightly assume that Congress has ef-

[28] In the absence of explicit authorization for the testing and the regulation, the Government may seek to rely upon congressional "ratification" of the Pacific tests by appropriations with knowledge of the tests;

fected a unilateral renunciation of solemn international obligations undertaken by the United States.

As the Supreme Court held in *Cook* v. *United States,* 288 U.S. 102, 120:

> "A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed. *Chew Heong* v. *United States,* 112 U.S. 536; *United States* v. *Payne,* 264 U.S. 446, 448."

Eloquent exposition of the rationale for the established rule appears in the opinion of the Supreme Court by Mr. Justice Harlan in *Chew Heong* v. *United States,* 112 U.S. 536:

> "The court should be slow to assume that Congress intended to violate the stipulations of a Treaty, so recently made with the government of another country . . . Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and the people of the United States is involved in every

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such an attempt, however, is precluded not only by the rule against implicit abrogation of treaty commitments but by the general presumption against implicit ratification. Thus, because congressional reenactment of ambiguous language is "an unreliable indicium at best" (*Commissioner* v. *Glenshaw Glass Co.* 348 U.S. 426; *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90), implicit ratification is rejected when statutory language is "wanting in that certainty and evident purpose which would justify acceptance as a legislative declaration". *Haggar Co.* v. *Helvering,* 308 U.S. 389, 400. Only recently in *Peters* v. *Hobby,* 349 U.S. 331, the Supreme Court rejected Presidential "ratification" of authority not explicitly granted by the President in an executive order. Moreover, the presumption against ratification is especially strong in the atomic energy area, where Congress has continuously revised a complex and detailed series of governing laws with ample opportunity to make explicit what has been authorized. See *Addison* v. *Holly Hill Co.,* 322 U.S. 607, 617.

inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted."

Certainly, in the absence of an explicit Congressional declaration, every presumption should be indulged against finding within the Atomic Energy Act authorization for prohibitory regulations incidental to nuclear tests which subject the population of the world to radiation-induced illness,[29] which violate our treaty commitments to the Marshall Islanders and which entail massive infringement upon the freedom of the high seas. Not only does the Atomic Energy Act lack such *explicit* authorization of nuclear tests in the Pacific as might be construed to override the solemn international commitments involved, but, as we have seen (Point I, *supra*), Section 161(i) does not even *implicitly* authorize the contested regulation. In these circumstances this Court cannot find within the Atomic Energy Act the explicit statutory language requisite to the

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[29] In this respect, the 1956 observations of the United States District Court in Utah in *Bulloch* v. *United States*, 145 F. Supp. 824, 826, are pertinent:

"Not unmindful of the vital importance of nuclear experimentation to the welfare and safety of our country, there yet has been established nothing here that would justify the intentional or negligent endangering of lives or property in the course of the tests. To seek to do so would seem to compromise fundamental human rights for the protection of which our governmental policy is designed. Indeed, while reluctant to broadly concede the point, it was not disputed by counsel for the Government that its responsibility was to so conduct the tests as not to intentionally, wantonly, or negligently endanger human life or private property. Certainly, there was no evidence from which it might be inferred that to do so was within the discretion vested in any officer or agent of the United States."

further finding of a Congressional intent to violate the international commitments of the United States. The absence of such language in Section 161(i) or indeed in any other provision of the Atomic Energy Act provides a most important argument for the construction of Section 161(i) which appellant urges upon this Court.[30]

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[30] There are so many reasons for the Court to interpret Section 161(i) to exclude the contested regulation that we are relegating the "presumption against extraterritoriality" to this footnote. It is a well established rule of statutory construction that, "unless the contrary intent appears," a statute is to be construed presumptively to apply only within the territorial jurisdiction of the United States. *Blackmer* v. *United States*, 284 U.S. 421, 437; *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357; *Foley Bros.* v. *Filardo*, 336 U.S. 281. Far from a contrary intent appearing here, Congress explicitly provided for activities outside the United States when it so intended.

Moreover, movement and travel of citizens beyond the United States is a matter within the special concern of the Department of State (see e.g., 44 Stat., 887; 22 U. S. C. 211a). Had Congress intended to authorize any unusual restrictions in this field, it is unlikely that it would have done so without obtaining an expression of views from the Department of State. Yet the legislative history of the Act is barren of any evidence that the Department of State was consulted in this regard. Similarly Congress would hardly have delegated authority to the Atomic Energy Commission to restrict travel on the high seas without involving the Department of State in such regulations. In other matters involving special competence of related Government agencies, the Atomic Energy Act is usually careful to provide for their participation. For example: Department of Defense, Secs. 27, 91, 123, 142-144 (42 U.S.C. 2037, 2121, 2153, 2162-2164); Attorney General, Secs. 105, 174, 221 (42 U.S.C. 2135, 2224, 2271); Federal Bureau of Investigation, Secs. 145, 221 (42 U.S.C. 2165, 2271); Civil Service Commission, Sec. 145 (42 U.S.C. 2165); Director of Central Intelligence, Sec. 142e (42 U.S.C. 2162e); Comptroller General, Sec. 166 (42 U.S.C. 2206); Commissioner of Patents, Secs. 151-152 (42 U.S.C. 2181-2182). Yet the Act is silent as to any participation by the Department of State in regard to the regulatory functions of the Commission. We submit, Section 161(i) gave the Commission no power to prohibit extraterritorial navigation on the high seas.

IV

Appellant Was Deprived of First and Fifth Amendment Rights Under the Commission Regulation Which Restrains Peaceable Protest and Freedom of Movement and Which Was Adopted Without the Requisite Notice and Opportunity for Hearing

Beginning in 1946 and continuing through October 1958, when the United States suspended nuclear testing under a voluntary undertaking, the Atomic Energy Commission conducted tests of atomic and hydrogen weapons in the Pacific Ocean. Prior to 1958 travellers by sea or air were warned of the specific "Danger Area" by publication of Notices to Mariners by the U. S. Navy Hydrographic Office in advance of each nuclear test. At no time between the initiation of the tests in 1946 and the promulgation of the contested regulation of April 11, 1958 did the Commission or any other governmental body exercise or even assert authority to enforce exclusion from the test area by criminal regulation or by criminal prosecution.

On September 15, 1957, the Atomic Energy Commission announced a new series of Pacific nuclear tests to begin in April, 1958. Early in January, 1958, the Commission received a notification from certain persons that they intended to sail their ketch, the "Golden Rule," into the danger area as a protest against the tests. On March 25, 1958, the "Golden Rule" sailed from California for Hawaii en route to carry out the announced protest. Notwithstanding the fact that the Commission had known since early January of the intention to sail the Golden Rule into the test area, the Commission took no public measures until the eve of the tests when, on April 11, it promulgated the regulation in question (23 F.R. 2401). In so doing, the Commission stated that the "customary" notice and opportunity for

hearing provided by the Administrative Procedure Act had not been followed because of the imminence of the test series.

On the basis of these facts, most of which appear in the affidavit of April 22, 1958 of Kenneth E. Fields, General Manager of the Atomic Energy Commission (see n. 1, p. 4, *supra*), it is quite clear that the contested regulation was prompted by and directed solely towards the crew of the "Golden Rule" and any others who might contemplate travel into the danger area as a means of public protest against testing. Indeed, appellant's counsel, in arguing in the District Court for a judgment of acquittal or a new trial, offered to prove at any such new trial that the regulation which appellant violated "was aimed solely at the 'Golden Rule'" and that the Commission issued the regulation "without a hearing at the last minute in order to avoid one" (R. 358).

Under these circumstances, appellant's conviction and sentence for violation of the regulation infringed First and Fifth Amendment liberties in both substantive and procedural respects.

A. *Freedom of Protest and Freedom of Movement*

The contested regulation trenches upon fundamental freedoms protected by the First and Fifth Amendments. Freedom of protest lies, of course, at the very heart of the First Amendment guarantees of speech and petition. Freedom of movement is equally protected against governmental infringement by the due process guarantee of the Fifth Amendment.

Long ago the Supreme Court said in *Williams* v. *Fears*, 179 U.S. 270, 274: "Undoubtedly, the right of locomotion, the right to remove from one place to another according to

inclination, is an attribute of personal liberty." And the Court most recently had occasion to examine and apply this "personal liberty" in *Kent* v. *Dulles,* 357 U.S. 116, where the Court stated (at pp. 125-126):

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Chafee, Three Human Rights in the Constitution of 1787 (1956), 171-181, 187 *et seq.,* shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See *Crandall* v. *Nevada,* 6 Wall. 35, 44; *Williams* v. *Fears,* 179 U.S. 270, 274; *Edwards* v. *California,* 314 U.S. 160."

Clearly, freedom of movement is a liberty protected by the Fifth Amendment. If necessary, we would urge in the instant case that the contested regulation violates that freedom, particularly because it constitutes a deliberate restriction by the Commission upon the right of a small group of protestors to sail the high seas, assuming the risk to themselves of contamination danger. But, as in the *Kent* case, it is unnecessary to "decide the extent to which it [freedom of travel] can be curtailed." In *Kent* the Court applied the familiar rule of avoidance of constitutional questions and found that the criteria employed by the

State Department in denying passports lacked Congressional authorization. The Court concluded (pp. 129-130):

> "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo,* 323 U.S. 283, 301-302. Cf. *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146, 156; *United States* v. *Rumely,* 345 U.S. 41, 46 . . . we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement."

The rule of avoidance of constitutional issues is doubly applicable here, for the Commission's regulation infringes upon appellant's freedom of protest under the First Amendment as directly as it does upon his freedom of movement under the Fifth. Freedom of protest is not an empty right to be exercised by ineffective intellectual conversation only; it is a substantial right that may be exercised in its most dramatic and attention-getting manner. *Cantwell* v. *Connecticut*, 310 U.S. 296, 309; *Saia* v. *New York*, 334 U.S. 558; *Terminello* v. *Chicago*, 337 U.S. 1. It was a dramatic, but not impermissible, form of protest for an American scientist to sail into the atomic fallout area to emphasize to the world at large the depth of his conviction by undertaking danger to himself and his family.

Moreover, the Commission had one purpose and one pur-

pose only behind its regulation—to prevent the very type of protest appellant sought to make. Protestors were not excluded from the testing zone in order to protect restricted information; official Russian and other hostile observers were permitted hospitable entry and, indeed, the Government no longer presses any such justification for the regulation. Finally, not only was the regulation intended to prevent protest by entry into the danger zone, but the manner in which the regulation was promulgated without notice or hearing further evidences the Commission's basic intent to avoid protest against its nuclear testing, whether on the high seas or at a hearing in Washington. We turn now to this latter aspect.

B. *Refusal of Notice and Hearing*

Although three months had intervened between the time it first learned that certain persons intended to sail into the danger area and the date when it issued its regulation,[31] the Commission nevertheless refused to provide public notice or opportunity for hearing before promulgating the regulation. Certainly the Commission's assertion of lack of time as ground for this unusual omission is of no avail, for where the Constitution demands opportunity for notice and hearing before agency action, the agency is not at liberty to wait until the last moment to announce that lack of time precludes such opportunity. If this were permissible, the

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[31] "Early in January, 1958, the Atomic Energy Commission received a copy of a letter dated January 8, 1958 addressed to the President, from the Committee for Non-Violent Action Against Nuclear Weapons. This letter informed the President that four members of the Committee planned to sail a 30-foot ketch into the Danger Area, to be designated by the Commission, in protest of the HARDTACK nuclear test series." April 22, 1958 affidavit (p. 2) of Kenneth E. Fields, General Manager of the Atomic Energy Commission, attached to the Opposition by the United States in the Supreme Court to an application for stay in the October 1957 Term in *Bigelow, et al.* v. *United States* (see n. 1, p. 4, *supra*).

constitutional requirement of notice and hearing could be rendered a nullity in every instance. The only question, therefore, is whether due process guarantees were applicable, requiring the Atomic Energy Commission to provide public notice and opportunity for hearing upon its proposed regulation.[32]

Notwithstanding the oft-quoted statement in *Bi-Metallic Co.* v. *Colorado,* 239 U.S. 441, concerning notice and hearing in administrative agency exercise of "legislative" as distinct from "adjudicatory" power, it is clear that the Fifth Amendment's notice and hearing requirements have applicability to the rule-making functions of administrative agencies. Thus where a rule affects a particular identifiable group as distinct from the public at large, the constitutional requirement of notice and hearing has been held to apply. See *Londoner* v. *Denver,* 210 U.S. 373; *Morgan* v. *United States,* 304 U.S. 1, 14-15; *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 152-3; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123; *Philadelphia Co.* v. *SEC,* 175 F.

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[32] The Senate Committee Report accompanying the Bill which became the Atomic Energy Act of 1954 (S. Rep. No. 1699, 83 Cong., 2d Sess.) discusses the Administrative Procedure Act, which was made applicable to the Atomic Energy Commission by the Act. The Committee stated at p. 28 that *"The Commission is required to grant a hearing to any party materially interested in any agency action."* Appellant therefore urged below that the Administrative Procedure Act (5 U.S.C. 1003) required opportunity for notice and hearing before promulgation of the regulation (R. 23, 355). While a ruling to this effect would of course avoid the necessity of a constitutional decision, appellant has, in light of the Government's assertions that the Act's military escape clause applies in the instant case, directed his argument primarily to the constitutional question. We do not, of course, concur with the Government's suggestion that the Administrative Procedure Act's military exception can be applied to the instant regulation. If the military exception applies here, it would probably be equally applicable to almost every action of the Commission and would thus defeat the stated congressional intent that that Act's provisions apply to grant a hearing "to any party materially interested" in the Commission's action.

2d 808. The critical distinction to be found in these and other Supreme Court decisions on this subject is the "particularity of application" of the administrative rule in question. See Schwartz, *Procedural Due Process in Federal Administrative Law,* 25 N.Y.U.L. Rev. 552; Nutting, *Adjudicative Procedure in Ad Hoc Rule-Making,* 10 U. Pitt. L. Rev. 155; Fuchs, *Constitutional Implications of the Opp Cotton Mills Case with Respect to Procedure and Judicial Review in Administrative Rule-Making,* 27 Wash. U.L.Q. 1, 8, 20; cf. Davis, *The Requirement of Opportunity to Be Heard in the Administrative Process,* 51 Yale L. J. 1093, 1117. Professor Schwartz in his treatment of the subject at 25 N.Y.U.L. Rev. 563, concludes:

> "The key element in determining whether notice and hearing need be given prior to the exercise of a delegated legislative function is that of applicability. If the rule involved is particular in its applicability, those affected have a right to be heard prior to its promulgation. Even if the administrative function involved is considered legislative in nature, because of the immediate effect upon particular persons, it must be exercised in accordance with the procedural safeguards . . ."

If "particularity of application" is the test, and we submit that it is, the regulation at issue falls clearly within that test. The Commission was fully aware when it issued the regulation and in the months earlier when it had the regulation under consideration (R. 358-359), that a mere handful of people were affected by it, to wit, those few persons willing to undertake radiation risk to themselves in order to dramatize their protest against testing. In these circumstances the opportunity for hearing would hardly be exercised by more than a handful of persons.

We cannot conceive of a regulation more particular in its application to a small and easily identifiable group.[33]

Moreover, in light of the Commission's knowledge that its regulation had immediate impact only upon a handful of persons, the Commission is not entitled to the presumption that its promulgation of the regulation exercised a "legislative" rather than an "adjudicatory" function. On the contrary, where, as here, a regulation affects the interests of a single group or entity, the agency's designation of its action as rule-making rather than adjudication has been disregarded and the constitutional requirements of notice and hearing for agency "adjudication" have been held fully applicable.

In *Philadelphia Company* v. *SEC,* 164 F. 2d 889, 175 F. 2d 808, *cert. denied,* 333 U.S. 828, the Securities and Exchange Commission had withdrawn by rule-making a general exemption formerly afforded by its regulations, with the knowledge that a particular company was the single concern then adversely affected by its action. Under these circumstances the Court of Appeals for the District of Columbia Circuit found that the SEC was not entitled to claim that its rule-making had been mere general reg-

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[33] While it is unnecessary, of course, to demonstrate that compliance with the constitutional notice and hearing requirement would have produced a result contrary from that achieved without such notice and hearing, we must point out the substantial likelihood of such a result. As we have previously shown, the purported statutory authority for the regulation was woefully inadequate to support it. A presentation of this point alone might have led the Commission to abandon the proposed regulation, or to seek to bring the regulation within the "trespass" section of the Atomic Energy Act with its more limited penalties or to seek more adequate and specific Congressional authority. Furthermore, inasmuch as the Commission's primary concern was to avoid public protest at a time when public tolerance of world contamination was rapidly being replaced by public apprehension that testing may have gone too far (R. 356-359), the Commission might well have refrained from promulgating the regulation at all had it been required to provide notice and hearing in advance thereof.

ulation and held that the rule promulgated had such "adjudicatory" applicability as to demand observance of constitutional notice and hearing requirements (175 F. 2d at 816-817):

> "We think the order of the Commission revoking the exemption theretofore afforded Pittsburgh by Rule U-49 (*c*) was invalid for lack of an adequate hearing, including improper allocation of the burden of proof. It is elementary that the action of an administrative tribunal is adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rule making action, general and future in effect. *Prentis* v. *Atlantic Coast Line,* 1908, 211 U.S. 210; *Louisville & Nashville R. Co.* v. *Garrett,* 1913, 231 U.S. 298; 42 Am. Jur., Public Administrative Law, §§ 38-40. Within this definition the Commission's order of revocation of Rule U-49 (*c*) is adjudicatory as to Pittsburgh. It is particular, i.e., it applies to the Pittsburgh reorganization alone—so much the Commission admits, as appears in the foregoing statement of facts; and it is immediate in its operation . . . It is elementary also in our system of law that adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of the due process clause of the Fifth Amendment of the Constitution. The applicability of this clause to the quasi-judicial proceedings of an administrative agency is recognized in *L. B. Wilson, Inc.* v. *Federal Communications Commission,* 1948, 84 U.S. App. D.C. —, 170 F.

2d 793, citing, among other authorities, *Londoner* v. *Denver,* 1908, 210 U.S. 373; *Radio Commission* v. *Nelson Bros. Co.,* 1933, 289 U.S. 266; and *Morgan* v. *United States,* 1938, 304 U.S. 1."

Thus, the Commission's failure to afford the few persons affected by its proposed regulation an opportunity to be heard prior to its promulgation renders the regulation defective under the due process guarantee of the Fifth Amendment and appellant's conviction erroneous.

V

Appellant Was Denied His Right Under the Sixth Amendment to Be Defended by His Chosen Counsel

It was appellant's right under the Sixth Amendment to the Constitution to be defended at his trial by counsel of his choice.[34] The record is clear that he was arbitrarily denied that right.

Appellant was arrested on the high seas and shortly thereafter was taken before the United States Commissioner at Hawaii. At his appearance before the Commissioner on July 8, 1958, appellant "announced that he intended to retain a mainland attorney" for his defense (R. 320). A few days later, since he was immediately confronted with the prospect of indictment and criminal proceedings, appellant retained a local counsel, Mr. Katsugo Miho, not to undertake the defense of any subsequent criminal action, but only to handle preliminary matters until appellant could

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[34] The Sixth Amendment's guarantee of "assistance of counsel" affords the right not merely to *an* attorney but to *the* counsel of defendant's choice. *House* v. *Mayo,* 324 U.S. 42, 45-46; *Glasser* v. *United States,* 315 U.S. 60, 75; *Chandler* v. *Fretag,* 348 U.S. 3, 9; *Powell* v. *Alabama,* 287 U.S. 45, 53, 68-9, 71.

obtain mainland counsel qualified to handle a case involving statutory and constitutional issues of the first magnitude (R. 320).

During the following fortnight Mr. Miho represented the appellant on July 21 in District Court proceedings involving waiver of indictment (R. 5-10) and on July 22 on appellant's request to go to Kwajalein to bring the Phoenix back to Hawaii (R. 11-20). During this time, however, appellant was already seeking mainland counsel. Appellant cabled Adlai Stevenson in Moscow requesting him to undertake the defense, but Mr. Stevenson "replied that he was not able to accept the . . . case" (R. 311). On July 28 Mr. Miho and appellant appeared before the District Judge with a request, which was granted, that appellant be permitted to come to the States to seek mainland counsel and financial assistance in connection with his defense (R. 42-48). On July 30 appellant met in the District of Columbia with Mr. Joseph L. Rauh, Jr. (R. 321), and on August 1, he tentatively obtained Mr. Rauh's consent to represent him (R. 321).

August 6 was the date which had been set for argument on the Motion to Dismiss, which had been filed by Mr. Miho before appellant left on his trip to the mainland (R. 322). As soon as appellant returned to Honolulu on August 3, appellant asked Mr. Miho to obtain a continuance of the Motion to Dismiss so that he could finalize his retention of Mr. Rauh and Mr. Rauh could take over the argument on that Motion and conduct the trial (R. 322). Pursuant to this conversation, Mr. Miho contacted the office of the United States Attorney and obtained an agreement to postpone for one month the hearing on the Motion to Dismiss (R. 322). However, the District Judge, on August 5 (R. 322, 413), refused to grant the continuance

despite the Government's acquiescence.[35] Despite the fact that Mr. Miho did not have time to prepare to argue the Motion to Dismiss and had never been retained for that purpose, appellant nevertheless felt constrained to allow Mr. Miho to argue the Motion in deference to the Court's action and on the information that the matters involved in the Motion could be raised again at the trial by Mr. Rauh (R. 322). The Motion was denied from the bench on August 6 without even hearing Government counsel (R. 87).

On the morning of August 11 appellant telephoned Mr. Rauh who agreed to represent appellant at the trial (R. 323). Mr. Rauh pointed out that his first free week without other prior commitments was the week of September 22; since travel to and from Hawaii, preparation and trial would take at least a week, the week of September 22nd was the earliest time he could represent appellant at the trial of the case (R. 323). That afternoon, Mr. Miho requested the District Judge to set the trial for the week of

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[35] This Court may wonder why the District Judge refused such a reasonable request for continuance in the face of both the Government's acquiescence and appellant's own earlier action in expediting the proceedings by "several months" (R. 321) by waiving grand jury indictment. The only explanation we can offer the Court is that the United States Attorney's acquiescence in appellant's request for delay appeared in a Honolulu newspaper prior to counsel presenting the request and acquiescence to the Court (R. 322), thus apparently exacerbating a long-standing feud between the United States Attorney and the Judge in which appellant was an innocent bystander. See *Honolulu Advertiser*, Friday, September 26, 1958, p. 4. We do not believe that either the United States Attorney or the District Judge would question the existence of this long-standing animus. Indeed, it was obviously to this feud that the representative of the Department of Justice referred when he informed Mr. Rauh just before the trial, in response to Mr. Rauh's request for assistance in obtaining a continuance, "We have no objection to the continuance. The Judge is objecting to the continuance . . ." and then remarked about the District Judge's "relationship to the United States Attorney" (R. 403-404).

September 22 on the above ground and others (R. 323). The District Judge refused this request which would have enabled Mr. Rauh to represent appellant; he set the case for trial on August 25th (R. 128), notwithstanding that appellant's waiver of grand jury indictment had already expedited his case by "several months" (R. 321), that the Government had not requested speed (R. 320, 322, 403-404), and that the date set actually resulted in an exceptionally brief period before trial.[36] In refusing a postponement to permit Mr. Rauh's presence at the trial, the Judge erroneously asserted that appellant had "chosen" Mr. Miho as his counsel (R. 114) and then concluded that the Sixth Amendment gave appellant the right to one counsel only[37] (R. 114, 128). The Judge was apparently influenced by his belief that this was nothing more than, in the words of Government counsel, "a traffic case" (R. 117); as far as expert counsel being required to handle the complicated statutory, constitutional and international issues involved, the

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[36] With but a single exception, where no postponement was requested (Case No. 11236, *United States* v. *Hieda*), of the indictments and informations filed in the United States District Court for the District of Hawaii between March and September of 1958, the shortest period between the filing of the information or indictment and the trial occurred in the case at bar.

[37] The Judge's view that appellant had no Sixth Amendment right to two attorneys is erroneous. Clearly, in addition to local counsel, appellant had the right to retain an expert counsel out of the jurisdiction for his defense (see *United States* v. *Bergamo*, 154 F. 2d 31). Equally clearly, exercise of that right did not require him to forego the advice and assistance of local counsel with respect to local procedural matters. The Sixth Amendment is not met merely by the presence of a lawyer, but requires the effective assistance of counsel. See *Glasser* v. *United States*, 315 U.S. 60, 76. In the instant case, effective assistance required a local counsel in addition to an out-of-state expert. We do not, however, rely upon appellant's right to two attorneys for, as the record demonstrates, Mr. Miho had never been chosen by appellant as an attorney to defend him at the trial, and had actually been dismissed even as local counsel prior to trial, undeniably leaving Mr. Rauh as the only counsel of appellant's choice in the case.

Judge simply said that these issues "have already arisen and have been disposed of" (R. 128).[38]

On August 20, the District Judge again refused a requested continuance until September 22 to permit Mr. Rauh's presence at the trial (R. 139-154). The Judge made this denial in the face of Mr. Miho's representation to him that "it was understood and our agreement was that inasmuch as there would be a lapse of time until he was able to get a mainland attorney, that he would retain my services until such time as he could obtain the mainland attorney and to take care of whatever preliminary needs that may be necessary until such time" (R. 147). Again the Judge was influenced by the erroneous and irrelevant observation that "this is not a case of any tremendous size or importance, despite the efforts to make it so" (R. 150).

On August 21, since appellant had never hired or desired Mr. Miho as his defense counsel for trial, appellant severed the attorney-client relationship with Mr. Miho, dismissing him from any further legal duties on his behalf (R. 155) and Mr. Miho filed his withdrawal as counsed (R. 156). Nevertheless, at a further hearing before the District Judge on August 23 (R. 157-173), despite the fact that the record once again clearly showed that Mr. Miho had never been retained as trial counsel (R. 161), that appellant had discharged Mr. Miho, and that appellant explicitly requested in open court that he be permitted to defend himself rather than to have Mr. Miho represent him (R. 160-162),

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[38] The Judge was clearly wrong in saying that all these issues had arisen and been disposed of in the denial of the Motion to Dismiss. Actually, Mr. Miho had not raised the all-important issue of the construction of Section 161(i) in his Motion to Dismiss (R. 21), but rather, as the Government sharply pointed out below (R. 37), had really just repeated the arguments in the Golden Rule case. Furthermore, as far as concerns the issues that were raised by the Motion to Dismiss, certainly appellant had a right at the trial to go into the *facts* on these points which could not be done on the Motion (see R. 379-382).

the District Judge ordered Mr. Miho to represent appellant and denied Mr. Reynolds the right to proceed *in propria persona* (R. 167-172).

At the trial which took place on August 25 and 26 (R. 174-302), Mr. Miho performed defense duties under protest (R. 176-185) and the District Judge consistently refused appellant's requests even to address the Court (R. 177, 178-180, 183, 185, 202, 280). After a perfunctory trial at which Mr. Miho raised none of the statutory, constitutional or international issues presented in this brief (see n. 38, p. 72, *supra*) and undertook all of his responsibilities without consent of, or consultation with, the defendant (R. 177),[39] appellant was convicted (R. 299).

On September 2, 1958, Mr. Miho filed a "Motion for a Judgment of Acquittal or in the Alternative Motion for a New Trial" (R. 304). This motion came on for hearing on September 25th, the date originally requested for the trial. Mr. Rauh appeared before the District Court to urge a new trial on the ground, among others, that appellant had been denied the right to be defended by counsel of his choice (R. 372). The motion was denied (R. 411).

On these facts there can be no doubt whatsoever that (1) Mr. Joseph L. Rauh, Jr., was the only counsel appellant had chosen to undertake his defense at the trial; (2) appellant was denied his right to be defended by Mr. Rauh; and (3) when that right was finally denied, the District Court would not even allow appellant to represent himself but forced upon him counsel he had never hired for the trial and did not desire for that purpose. Under these circumstances, appellant's Sixth Amendment rights were clearly violated.

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[39] That Mr. Miho "represented" the District Judge rather than appellant is evident from the Judge's action in directing Mr. Miho that he did "not have to take any orders from the defendant regarding how you as an attorney shall conduct his case" (R. 185).

The Sixth Amendment guarantees a criminal defendant the right to be defended not merely by *an* attorney but by *the counsel of his choice. House* v. *Mayo,* 324 U.S. 42, 45-46; *Glasser* v. *United States,* 315 U.S. 60, 75; *Chandler* v. *Fretag,* 348 U.S. 3, 9; *Powell* v. *Alabama,* 287 U.S. 45, 53, 68-9, 71. When a defendant has made that choice, he is entitled to have chosen counsel represent him, and for that right the Court may not substitute some other counsel not so chosen, even if the alternative counsel be an attorney *associated* with the chosen counsel (*United States* v. *Koplin,* 227 F. 2d 80, (C.A. 7)), defendant's chosen *local* counsel *(United States* v. *Bergamo,* 154 F. 2d 31 (C.A. 3)), or counsel *formerly* chosen by a defendant whom he no longer desires (*Wilfong* v. *Johnston,* 156 F. 2d 507 (C.A. 9); *Lee* v. *United States,* 235 F. 2d 219 (C.A.D.C.)).

As the record shows and *as the Court was clearly informed prior to trial,*[40] Mr. Miho, whom the Court ordered to defend appellant at the trial, had never been retained by appellant for that purpose and had previously been dismissed as his attorney for any purpose whatsoever. His "representation" of appellant at the trial therefore clearly did not meet the Sixth Amendment's requirement of effective assistance of counsel nor the Sixth Amendment's guarantee of assistance of chosen counsel.

Of course, a defendant may not by insisting upon representation by counsel of his choice, demand unlimited post-

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[40] The Judge relied heavily upon the fact that Mr. Miho had entered a general appearance (R. 310). There is nothing in the record to indicate that this is not the accepted practice in the United States District Court for Hawaii when local counsel is retained. At any rate, the significant point is that the District Judge was advised several times before trial (R. 147, 161, 180) that Mr. Miho was not in fact making a general appearance, but had been retained solely to handle preliminary matters until appellant could obtain the services of mainland counsel. The Judge's continuing reliance upon the formal general appearance after he knew that there was not in fact a general representation only compounds the arbitrary nature of his action.

ponements of his trial.[41] But nothing like that is presented here. On the contrary, appellant's case was given an exceptionally brief period between information and trial (see n. 36, p. 71, *supra*), despite the fact that appellant had already considerably expedited these proceedings by waiver of indictment (R. 321). The only month delay requested by appellant was perfectly reasonable and proper to permit counsel from the District of Columbia to prepare for trial, arrange his other pending commitments and come 5000 miles to Hawaii for the trial. The setting of the trial for a date when, as the Court was informed, appellant's chosen counsel would be unavailable, was an arbitrary denial of rights under the Sixth Amendment. It is especially arbitrary where the trial Judge knew the importance of mainland counsel's presence, having himself authorized appellant's trip to the mainland to obtain that counsel (R. 42-48). Certainly nothing here presented justifies the trial Judge's undue haste to try the appellant before the counsel obtained on that trip could come to Hawaii.[42]

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[41] 50 Col. Law Rev. 87, 91, *"Client's Ability to Discharge Counsel"*, suggests that "even aside from constitutional guarantees, it would seem that any request by a defendant in a criminal case for permisson to dismiss his attorney which does not involve delay or other interference with the administration of the trial, and probably even one which does involve a reasonable delay, should be granted." One compelling reason, of course, for favoring the constitutional right over the court's docket, is that to do otherwise when chosen counsel is not immediately available but will be in the foreseeable future, is arbitrarily to penalize the defendant for the unavailability of his attorney.

[42] Although no prejudice need be shown in connection with deprivation of counsel under the Sixth Amendment, which is deemed inherently prejudicial (see *Glasser* v. *United States*, 315 U.S. 60, 75-76), it should be noted that appellant was, of course, prejudiced by the denial of his right to be represented by Mr. Rauh. As Mr. Rauh indicated in subsequent offers of proof (R. 379-382), he would have sought to develop considerable factual material at the trial bearing upon the vital and untested statutory, constitutional and international contentions raised both in the District Court and on this appeal. Without that material appellant's ability adequately to present those questions in this Court is seriously impaired.

But if all the foregoing were rejected, the Court's action would still be in violation of appellant's Sixth Amendment rights. Having refused a postponement to permit appellant's defense by his chosen counsel, it was totally arbitrary and capricious and in clear violation of appellant's Sixth Amendment rights, also to deny him the right to represent himself at the trial and to force him to accept representation by an attorney he did not desire. The Court may not force unwanted counsel upon a competent defendant, depriving him of his Sixth Amendment right to be his own counsel, and to plead his own case. See *Swope* v. *McDonald,* 173 F. 2d 852, 854, n. 2; *Betts* v. *Brady,* 316 U.S. 455, 465-468; *Powell* v. *Alabama,* 287 U.S. 45, 68. As the Supreme Court stated in *Adams* v. *United States*, 317 U.S. 269, 279, the Sixth Amendment affords "*the right to assistance of counsel and the correlative right to dispense with a lawyer's help* . . ." The District Judge's refusal to permit appellant, instead of his dismissed and undesired local counsel, to make his own defense and to speak for himself before court and jury is, we believe, totally without reason, justification or precedent in the history of federal criminal trials. The unconstitutionality of the Judge's action in this respect requires no further elaboration.

Appellant having been denied his Sixth Amendment rights, the trial was a nullity and appellant's conviction must be reversed.

Conclusion

It is respectfully submitted that, for the reasons set forth in Points I, II, III and IV, this Court should direct the entry of a judgment of acquittal.

If, however, this Court should feel that the instant record developed in the absence of appellant's chosen counsel is inadequate to resolve the vital legal issues presented in

one or more of those four Points, then it is respectfully submitted that, at the very least, a new trial should be directed both for that reason and because of the denial of counsel set forth in Point V.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
LUCIEN HILMER,
JOHN SILARD,
FREDERICK S. WYLE,
Attorneys for Appellant.

APPENDIX A

UNITED STATES ATOMIC ENERGY COMMISSION
WASHINGTON 25, D. C.

No. A-77
Tel. HAzelwood 7-7831
Ext. 3446

For Immediate Release
(Friday, April 11, 1958)

AEC Issues Regulations Prohibiting Entry Into Weapons Testing Danger Area by Persons Subject to the Jurisdiction of the U. S.

The Atomic Energy Commission is issuing regulations which prohibit entry into the Danger Area of the Eniwetok Proving Ground of U. S. citizens and all other persons subject to the jurisdiction of the United States, its territories and possessions.

The regulations effective from April 11, 1958 until the Hardtack test series is completed prohibit entry, attempted entry or conspiracy to enter the danger area, the boundaries of which were announced on February 14, 1958.

The regulations were filed today with the Federal Register. A copy of the regulations is attached.

Attachment

41158

UNITED STATES ATOMIC ENERGY COMMISSION

Title 10—Atomic Energy

Chapter 1—Atomic Energy Commission

Part 112—Eniwetok Nuclear Test Series, 1958 [43]

On February 14, 1958, the Atomic Energy Commission issued public notice of the danger area to be established April 5, 1958 in connection with the forthcoming Hardtack nuclear test series to be conducted at the Eniwetok Proving Ground in the Marshall Islands. The efficient and early completion of this test series, which is to begin in

[43] This regulation was withdrawn on Sept. 8, 1958 (AEC Release, No. A-236).

April 1958, is of major importance to the defense of the United States and of the free world.

To avoid any unnecessary delay or interruption of that test activity, and to protect the health and safety of the public, the Atomic Energy Commission is issuing the following regulations which will be effective until the HARDTACK test series is completed:

In view of the importance of these tests to the national defense, the potential hazard to the health and safety of individuals who enter the danger area, and the early starting date of the tests, the Atomic Energy Commission has found that general notice of proposed rule making and public procedure thereon would be contrary to the public interest; and that good cause exists why these rules should be made effective without the customary period of notice.

Pursuant to the Administrative Procedures Act, Public Law 404, 79th Congress, 2d Session, the following rules are published as a document subject to codification, to be effective upon filing with the Federal Register:

Sec.

Authority: Secs. 112.1 to 112.4 issued under Sec. 161, 68 Stat. 948; 42 U.S.C. 2201. Interpret or apply Sec. 91, 68 Stat. 936; 42 U.S.C. 2121; Sec. 2, 68 Stat. 921; 42 U.S.C. 2012; and Sec. 3, 68 Stat. 922; 42 U.S.C. 2013. For the purposes of Sec. 223, 68 Stat. 958; 42 U.S.C. 2273, Sec. 112.4 issued under Sec. 161 i.

Sec. 112.1 *Purpose.* The regulations in this part are issued in order to permit the Atomic Energy Commission in the interest of the United States to exercise its authority pursuant to section 91.a. of the Atomic Energy Act of 1954, as efficiently and expeditiously as possible with a minimum hazard to the health and safety of the public.

Sec. 112.2 *Scope.* This part applies to all United States citizens and to all other persons subject to the jurisdiction

of the United States, its Territories and possessions.

Sec. 112.3 *Definitions.* As used in this part:

(a) "Danger Area" means that area established, effective April 5, 1958, encompassing the Bikini and Eniwetok Atolls, Marshall Islands and which is bounded by a line joining the following geographic coordinates:

18° 30′ N.	156° 00′ E.
18° 30′ N.	170° 00′ E.
11° 30′ N.	170° 00′ E.
11° 30′ N.	166° 16′ E.
10° 15′ N.	166° 16′ E.
10° 15′ N.	156° 00′ E.

(b) "HARDTACK test series" means that series of nuclear tests to be conducted by the Atomic Energy Commission and the Department of Defense at the Eniwetok Proving ground located within the above defined danger area and which are to begin in April 1958, and end at an announced time during the calendar year 1958.

Sec. 112.4 *Prohibition.* No United States citizen or other person who is within the scope of this part shall enter, attempt to enter or conspire to enter the danger area during the continuation of the HARDTACK test series, except with the express approval of appropriate officials of the Atomic Energy Commission or the Department of Defense.

No. 16,249

IN THE

United States Court of Appeals

For the Ninth Circuit

EARLE L. REYNOLDS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal No. 11,258.

APPELLEE'S ANSWERING BRIEF.

J. WALTER YEAGLEY,
Acting Assistant Attorney General,
Internal Security Division,

LOUIS B. BLISSARD,
United States Attorney,
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Subject Index

Table of Authorities Cited

Cases

Statutes

Regulations

Miscellaneous

No. 16,249

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APPELLEE'S ANSWERING BRIEF.

JURISDICTIONAL STATEMENT.

Appellee agrees with the jurisdictional statement set forth at page 1 of appellant's brief.

STATEMENT OF THE CASE.

So much of the statement of the case contained in appellant's brief is taken from outside the record or from a statement which the appellant made to the Court at the time of sentencing that it is deemed appropriate that appellee make its own statement of the

case, based upon the evidence and those portions of the record which this Court may properly consider.

On May 8, 1958, the appellant, a citizen of the United States (R. 188, 236), was given a copy of a Notice to Mariners published by the United States Navy Hydrographic Office, containing the Regulation issued by the Atomic Energy Commission on April 11, 1958 (hereinafter called the Regulation), (R. 194-8). This Regulation barred all United States citizens from a defined danger area in the Eniwetok atomic proving grounds during a certain period and except under certain circumstances not here pertinent. Subsequent thereto the appellant, his wife and two children and an additional crewman, set sail from Honolulu on his yacht "Phoenix" and on June 30 approached the said danger area. Pursuant to orders, the Coast Guard cutter "Planetree" on this date intercepted the yacht "Phoenix" to advise her of her position, of the contents of the AEC regulation, and to ascertain the intention of the master as to whether or not he intended to enter the nuclear testing area, the so-called danger zone (R. 207-8).

The master of the "Phoenix", appellant herein, informed the master of the Coast Guard vessel that he intended to enter the danger area (R. 209). When the "Phoenix" was about seven miles outside the danger area she was again advised by the Coast Guard officer of her position, and again warned of the penalties involved and the fact that the master would be subject to arrest if he entered the danger area (R. 210-11). The appellant stated that he understood but proceeded

nevertheless to a point sixty-five miles inside the danger area, on the high seas, where on July 2, 1958, he was placed under arrest for violating the Regulation (R. 211, 233). After removing the yacht and those aboard from the danger area, the Coast Guard arresting officer brought the appellant to Honolulu, District of Hawaii, on July 8, 1958, from Kwajalein.

Appellant was taken before the Commissioner and committed on July 8, 1958, pending action of the grand jury. The appellant appeared with counsel before the trial court on July 21, 1958, waived indictment and obtained a continuance for plea to the Information (R. 2-5). On July 28, 1958, appellant's counsel filed a motion to dismiss, noticed for hearing on August 6, 1958 (R. 21, 308), and appellant received permission to travel to the mainland United States to obtain additional legal assistance and funds (R. 43-48).

The motion to dismiss was heard and denied on August 6, 1958, and the matter of setting trial was continued to August 11, 1958 (R. 51-94).

On August 11, 1958, trial was set for August 25, 1958, the Court having refused appellant's request to set trial for September 24, 1958, a date unavailable on the Court's calendar (R. 102-129, 313).

On August 18, 1958, appellant filed a motion to postpone the trial together with an affidavit by appellant's Washington counsel, Mr. Rauh. Mr. Rauh's affidavit requested the postponement on the ground that the trial, as then set, would interfere with Mr. Rauh's vacation plans and other commitments (R. 130-135).

On August 20, 1958, the motion to postpone the trial was heard and denied on the grounds that the alleged inability of Mr. Rauh to appear as scheduled was non-existent (R. 140-154), and that the Court itself had commitments that prevented its acceding to Mr. Rauh's request (R. 313).

The following day appellant filed a "Notice of Discharge" of counsel and Mr. Miho attempted to withdraw. Appellant interceded for Mr. Miho in the latter's request for leave to withdraw and expressed a willingness to defend himself (R. 157-172). The Court found the withdrawal on the eve of trial to be unjustified and found that appellant was satisfied with and needed Mr. Miho's services. Leave to withdraw was accordingly denied and appellant was denied leave to defend in *propria persona* (R. 167-172).

On August 25 and 26, 1958, appellant, represented by his counsel, was tried before a jury and convicted. Mr. Rauh chose not to appear at the trial (R. 176-303). This appeal followed.

ARGUMENT.

I.

THE COMMISSION REGULATION OF APRIL 11, 1958, WAS VALIDLY ISSUED PURSUANT TO AUTHORITY GRANTED BY CONGRESS IN THE ATOMIC ENERGY ACT OF 1954.

A. The regulation was promulgated pursuant to the authority granted by Section 161 (i) of the Act (42 U.S.C. 2201 (i)) generally and was not limited to the authority found in Subclause (3) thereof.

Under Section 91 (a)(1) of the Atomic Energy Act of 1954 the Atomic Energy Commission is authorized to "conduct experiments and do research and development work in the military application of atomic energy" (42 U.S.C. 2121 (a)(1)). The Act defines the phrase "research and development" to mean *(id.* at 2014 (v)):

> * * * (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental demonstration purposes, including the experimental production and testing of models, devices, equipment, material, and processes.

Palpably then, the Act, as literally read, is broad enough in scope to embrace the type of nuclear test activities engaged in by the United States at Eniwetok and Bikini Atolls for the past twelve years, including the HARDTACK series conducted in 1958. The Commission is not only vested with *authority* to carry on such activities, but it is affirmatively charged with responsibilities relating, *inter alia,* to the defense

of the United States, the safeguarding of Restricted Data and the protection of the health and safety of the public. See, *e.g.,* 42 U.S.C. §§ 2011-2013, 2037, 2121, 2153, 2161-2165.

On September 15, 1957 the Atomic Energy Commission announced a series of nuclear tests to begin in April, 1958 at the Eniwetok Proving Grounds in the Pacific. These tests were officially designated as the HARDTACK test series. On February 14, 1958, the Commission issued public notice of the danger area to be established April 5, 1958 in connection with the forthcoming HARDTACK series. By regulation (23 Fed. Reg. 2401; Br. App. A, pp. 78-80) dated April 11, 1958, the Commission issued the following prohibition:

> [t]o avoid any unnecessary delay or interruption of that test activity, and to protect the health and safety of the public, * * *.
>
> * * * * * *
>
> § 112.4 *Prohibition.* No United States citizen or other person who is within the scope of this part shall enter, attempt to enter or conspire to enter the danger area during the continuation of the HARDTACK test series, except with the express approval of appropriate officials of the Atomic Energy Commission or the Department of Defense.

The authority under which the Commission acted in promulgating Section 112.4, *supra,* of the Regulation, is specifically enumerated therein (23 Fed. Reg. 2401; Br. App. A, p. 79) to be Section 161 (i) (42 U.S.C. 2201 (i)) of the Atomic Energy Act of 1954. Section

161 (i) authorizes the Commission in the performance of its functions to:

> Prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this chapter, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 2073 of this title or produced by any person in connection with any activity authorized pursuant to this chapter, and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property.

Appellant contends (Br. 15-24) that Congress did not authorize the Commission to issue the April 11, 1958 Regulation. As the initial premise to his argument, he assumes that the Commission acted under the purported authority granted by subclause (3) of Section 161(i), since allegedly, the latter "made no claim" that the regulation "was for any of the purposes specified in subclauses (1) and (2)" thereof[1]

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[1]Appellant contends that Government counsel in the Court below conceded that authority for the regulation of April 11, 1958 was based solely upon subclause (3) of Section 161(i). However, since counsel for appellant had contended that the regulation was poised solely on the subsection of the statute designed to protect Restricted Data, Government counsel merely sought to

(Br. 16). Appellant's assumption, however, we submit, plainly does not withstand analysis.

In promulgating the regulation, the Atomic Energy Commission set forth the authority of Section 161(i) generally and did not limit it to any particular subclause thereof. The facts surrounding the issuance of the regulation and the preamble to the regulation itself, moreover, make it abundantly clear that the regulation was issued to effectuate ends specified in each of the three subclauses of the Section.

Entrusted to the Commission by Congress is the responsibility of controlling the dissemination of Restricted Data. It is quite obvious that entry into the HARDTACK Danger Area by unauthorized persons—for example, those without a Q-clearance—could result in a compromise of Restricted Data. The very nature of the tests conducted at the Eniwetok Testing Ground compel this conclusion. By the same token, located at the Testing Ground were test devices which contained special nuclear material which could be both lost and diverted to the detriment of our common defense and security by the entry of unauthorized persons therein. Pursuant to the authority vested in the Commission under the first two sub-clauses of 161 (i) (42 U.S.C. 2201 (i), (1), (2), see *supra,* p. 7), to protect Restricted Data and to guard against loss or

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place the regulation within the purview of subclause (3) as well as subclause (1) (R. 386-387). In any event, the point in issue now is whether or not the Atomic Energy Commission had authority to and did in fact issue the regulation under Section 161(i) generally.

misuse of special nuclear material in addition to its responsibility under subclause (3) to protect the health and safety of the public (*ibid.*) the regulation of April 11, 1958 was promulgated. Since the Commission is charged with these responsibilities, it was not only proper but necessary to issue the regulation in order to competently fulfill the duties entrusted to it.

That the Commission intended to rely upon Section 161 (i) (42 U.S.C. 2201 (i)) generally, rather than merely upon subclause (3) thereof is also clear from the preamble to the regulation itself (see 23 Fed. Reg. 2401; Br. App. A, pp. 78-79). As stated therein, the purpose of the regulation was "to avoid any unnecessary delay or interruption of the test activity *and* to protect the health and safety of the public." It is apparent, therefore, that one of the Commission's purposes in promulgating the regulation was to avoid any interruption of the test activity, whether caused by danger to life or property or by the possibility of compromising Restricted Data due to the presence of unauthorized individuals. The preamble further states, moreover, that "[t]he efficient and early completion of this test series * * * is of major importance to the *defense* of the United States and of the free world" (*ibid.,* emphasis added). Since no flavor of national defense can be gleaned from subclause (3), which relates merely to the protection of the health and safety of the public, it is obvious that authority for the regulation was not based solely upon that subclause.

However, even if subclause (3) was the sole basis for the Commission's exercise of authority, we think it quite clear that the regulation was validly promulgated thereunder. Subclause (3) authorizes (42 U.S.C. 2201 (i) (3)) regulations:

> to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property.

It is apparent that the end to be effectuated by this provision was the issuance of regulations to protect health and to minimize danger to life or property, which from the very nature of the statutorily authorized activities, would necessarily result if minimum safety standards and rules and regulations respecting the operation of the activities were not set up. Such danger to life and property might result from the construction, design or location of facilities, the use of faulty and substandard equipment and the failure to employ trained and qualified personnel or to take the proper steps to insure, to the greatest degree possible, their safety while performing their various functions and duties, as well as by allowing untrammeled locomotion or navigation through areas contaminated by exposure to lethal degrees of radiation. Clearly, the authorization to issue regulations under subclause (3) was undoubtedly intended by Congress to give the Commission power to adequately deal with all of these dangers, including the latter. It is un-

disputed here that the undetected entry into the Eniwetok testing area would have constituted a serious hazard to the persons and property of the entrants. The Commission's April 11, 1958 Regulation was designed to avoid this danger and, as we have shown, was clearly authorized by subclause (3) of Section 161 (i). Some may insist, as has been done in the past, that the safety of those desiring to enter this danger area is a matter for their sole concern. We submit, however, that elementary considerations, including the duty of every nation to conduct its affairs with due regard to the safety of human life and property as well as the Commission's statutory responsibilities in this regard did not permit the Commission to remain aloof.

B. Section 161(i) authorizes the Commission to issue regulations for the purposes specified therein, in connection with the conduct of nuclear weapons tests such as the HARDTACK series and applicable to persons who, like appellant, are "strangers" to the atomic energy program.

Appellant contends (Br. 17-24) that the April 11, 1958 Regulation was issued by the Commission without statutory authority, since subclause (3) of Section 161 (i), which allegedly constituted the sole basis of the latter's action (Br. 16), was purportedly not intended by Congress to permit the Commission to regulate the activities of persons who, like himself, are "strangers" to the atomic energy program, nor in connection with activities such as the Commission's own weapon testing. His argument is founded on an interpretation of what he calls the "key words" (Br.

18) of subclause (3). We submit that the argument lacks merit.

(1) Appellant first contends (Br. 18-21) that the phrase "activity authorized pursuant to this Act," which limits the scope of the regulations authorized under all three subclauses of 161 (i), does not include activities assigned to the Commission, such as atomic weapon testing, but instead, pertains only to activities authorized by the Act to be performed by others under Commission authorization and regulation. Appellant points out that subclauses (1) and (2) permit regulations specifically affecting *persons* engaged in activities authorized under the Act. (See 42 U.S.C. 2201(i) (1) and (2)) and that the Commission is expressly excluded from the definition of "person" contained in Section 11(q) (42 U.S.C. 2014(q)) thereof. He thus concludes that the scope of the activities to which subclauses (1) and (2) pertain does not include those which the Act authorizes the Commission itself to perform and that the activity referred to in subclause (3) is also so limited since "there is nothing to suggest that such activity is different in type from that referred to in subclauses (1) and (2)" (Br. 21).

At the outset, it should be noted that there is nothing in the language of subclause (3) which suggests that the regulations authorized thereunder are limited to those which affect *persons* engaged in activities authorized by the Act. Subclause (1) permits regulations "to protect Restricted Data received by any *person* in connection with any activity authorized pur-

suant to this Act" (42 U.S.C. 2201(i) (1); emphasis added). Subclause (2) authorizes the Commission "to guard against the loss or diversion of any special nuclear material acquired by any *person* pursuant to section 2073 or produced by any *person* in connection with any activity authorized pursuant to this Act" (42 U.S.C. 2201(i) (2); emphasis added). Subclause (3), however, permits the issuance of regulations "to govern any activity authorized pursuant to this Act" (42 U.S.C. 2201 (i) (3)) and makes no reference to "persons." There is, therefore, manifestly no basis, we submit, for the conclusion that the scope of the authority granted under subclause (3) is curtailed by any limitation placed upon it by the Act's definition of the term "person."

Assuming *arguendo,* however, that the Commission's authority under subclauses (1) and (2) must be read in the light of the limitations, if any, inherent in the Act's definition of "person" and that such limitations affect, as well, the scope of the authority which may be exercised under subclause (3), it does not follow, as appellant suggests, that Section 161(i) does not authorize the issuance of regulations for the purposes specified in that section, in connection with activities, such as nuclear weapons testing, which the Act authorizes the Commission itself to perform. Though, it is true that Section 11(q) (42 U.S.C. 2014(q)) expressly excludes the Commission from the definition of the term "person," appellant overlooks the fact that the Commission's agents and employees are included within the definition of that term. This

conclusion must necessarily follow, we think, from the fact that under the Act "person" means, *inter alia,* "any individual" *(ibid.).* It cannot be seriously disputed that the Commission's agents and employees are "individuals" within the meaning of the Act, especially since the term is preceded in the statute by no more a qualifying adjective than "any." Thus, even if the regulations which are authorized under subclauses (1) and (2) and consequently (as appellant contends) under subclause (3) are limited to those affecting "persons" engaged in activities authorized by the Act, then, under appellant's own reasoning, all three subclauses would include activities which the Act authorizes the Commission itself to perform since, as we have shown, the language used (i.e.—"person[s]") would not exclude the latter's agents and employees.

Finally, we think that the plain language of Section 161(i) serves to refute appellant's contention. All three subclauses thereof permit the issuance of regulations for the purpose specified in each subclause "in connection with" or "to govern" "*any* activity authorized pursuant to this Act" (42 U.S.C. 2201 (i); emphasis added). It is obvious from such language that the intent of Congress was to cover *all* the activity authorized by the Act and not to refer only to *some* of such activities. For, if the latter was intended, no sound reason has been advanced by appellant why Congress would not have made clear the included or excluded activities by enumerating them in the statute. The statutory language used in this respect being

clear, there is, we submit, no necessity to go beyond the plain meaning of that language in construing the statute.[2] *United States v. Hood,* 343 U.S. 148; *United States v. American Trucking Ass'n.,* 310 U.S. 148; *Chung Fook v. White,* 264 U.S. 443; *Lake County v. Rollins,* 130 U.S. 662.

(2) Appellant next contends (Br. 21-23) that the term "facilities" as used in subclause (3), "reinforces the conclusion" that Section 161(i) "relates to activities authorized under the Act to be performed by licensees, contractors and other persons" (Br. 21). His argument, however, rests upon two assumptions, both of which, we think, are unfounded. Appellant first assumes that the only activities which may be regulated under subclause (3) are those which are similar to the type specified in the phrase "including

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[2]Nor, if it were necessary to go beyond the "plain meaning" of the statutory language, would the legislative history of Section 161(i) support the interpretation of that section urged by appellant. Two of the three references to the legislative history cited by appellant (Br. 26-27, n. 9) plainly do not shed light on the intended meaning of the language "any activity authorized pursuant to this Act" since they are couched in substantially the same language as the statute itself. See Hearings before Joint Committee on Atomic Energy on S. 3323 and H.R. 8862, 83rd Cong., 2d Sess., p. 601; S. Rept. No. 1699, 83rd Cong., 2d Sess., p. 26. If these references have any value in explaining the meaning of Section 161(i) they would, we submit, support a broad rather than a limited construction of that Section. The third reference cited by appellant—*i.e.* the remark of Mr. William A. Steiger of the National Association of Manufacturers that "[t]his Chapter authorizes the Commission to do a number of things including the establishment of standards of safety for licensees." Hearings, *supra,* at p. 465, is, insofar as it tends to support appellant's construction of Section 161(i), explained in view of Mr. Steiger's limited purpose in appearing before the Joint Committee. *Id.* at 461.

standards and restrictions governing the design, location and operation of facilities used in the conduct of such activity" (see subclause (3), 42 U.S.C. 2201 (i) (3)). We submit, however, that the doctrine of *ejusdem generis,* urged by appellant in support of this assumption, is inapplicable. The doctrine of *ejusdem generis* applies only to statutes which enumerate specific terms followed by one or more general terms. *United States v. Alpers,* 338 U.S. 680, 682-683; *Gooch v. United States,* 297 U.S. 124, 128. Since Section 161(i) (3) is not such a statute, the rule is clearly inapposite. Thus, the "including" phrase in the subclause does not control the types of activities which may be regulated thereunder but merely makes clear that these activities include the design, location and operation of facilities.

Secondly, appellant urges that the "including" phrase refers only to activities other than weapon testing because the use of the term "facilities" therein allegedly precludes reference to the latter activity. This conclusion rests upon the assumption that the only "facilities" comprehended by the Act are "production and utilization facilities" both of which, by definition, do not relate to atomic weapons or weapons test devices (see 42 U.S.C. 2014(t), (aa), (d)). Though we think that our immediately preceding argument, if correct, would preclude the necessity of refuting this aspect of appellant's argument, we attempt to do so, in the event that the Court does not agree with our interpretation of subclause (3) advanced therein.

Concededly, the Act defines only two types of "facilities." It is true also, that the definition of a "production facility" in Section 11(t) (42 U.S.C. 2201(t)) and the definition of a "utilization facility" in Section 11(aa) (42 U.S.C. 2201(aa)) do not relate to atomic weapons or weapons test devices (see also 42 U.S.C. 2201(d)). It does not follow, however, that the fact that these two types of facilities are specifically defined in the Act means that no other types of facilities are comprehended therein or that only the former are referred to by the use of the term "facilities" in subclause (3). On the contrary, an examination of the Act compels the conclusion that other types of facilities are sometimes referred to. Though many sections specifically refer to production or utilization facilities as such (see 42 U.S.C. 2012(e), (f), 2019, 2020, 2051 (a) (4), 2061, 2063, 2064, 2073, 2121, 2131-2134, 2136, 2137, 2139, 2140, 2232, 2235, 2238), only a few, when they are referring only to these types of facilities, fail to specifically label the type of facility referred to (see, *e.g.,* 42 U.S.C. 2233, 2236). On the other hand, some sections do not specifically refer to production or utilization facilities and were apparently intended to apply to other types of facilities as well as those for production and utilization of special nuclear material (see 42 U.S.C. 2017, 2017b, 2052, 2053, 2201(e), (i), (k), (m), 2271, 2278a). Thus, for example, Section 161(e) makes reference to "facilities * * * for the housing, health, safety, welfare, and recreation of personnel employed by the Commission" (42 U.S.C. 2201(e)) which obviously does not refer to produc-

tion or utilization facilities. It is clear from this, we think, that "facilities" as used in subclause (3) does not necessarily refer only to those for production or utilization. And, there is no sound reason why that term as it appears in this subclause of Section 161(i) should be afforded the limited construction contended for by appellant.

Nor is it significant that "production facility" and "utilization facility" are the only types of facilities specifically defined in the Act (42 U.S.C. 2201(t) and (aa)). These terms are, by those very definitions, given a special and limited meaning in the Act and, as an examination of the Act will demonstrate, are usually specifically referred to as such when the intent is to refer to them only. There being no evidence that the term "facilities" as used in Section 161(i)(3), without a qualifying adjective, was intended to have a special meaning, it must be given its ordinary meaning and, its dictionary definition may be used as an aid to construction. See, *e.g., Nix v. Heddon,* 149 U.S. 304, 306. Webster's New Collegiate Dictionary defines the term to mean, *inter alia,* "a thing that promotes the ease of any action, operation or course of conduct" (2d ed. 1953, p. 296). It is readily apparent that atomic weapons, and weapons test devices, as well as nuclear weapons tests installations are included within this definition. Thus, even if the activities which the Commission is authorized to regulate under subclause (3) are limited to those of the same type to which the "including" phrase relates, the Commission is clearly authorized, under the subclause to issue regulations in connection with nuclear weapons tests.

(3) Appellant next contends (Br. 23) that, whatever the meaning of the term "facilities" in subclause (3), the contested regulation was not authorized thereunder, since, allegedly, it did not govern the "design, location and operation" of any facility and this is all that the subclause permits to be regulated with respect to "facilities." As we have previously noted (*supra,* pp. 15-18), however, the subclause permits regulations "to govern *any* activity authorized pursuant to this Act" and there is manifestly no basis for the conclusion that the scope of the regulations authorized by that phrase is limited by the "including" phrase which follows it. In addition, we think, that the prohibition against entry into the test area by persons under the jurisdiction of the United States, pursuant to the regulation, *was* authorized as a "restriction" "governing the * * * operation of" a "facility" (nuclear weapon test area) "used in the conduct of such activity" (nuclear weapons tests). See 42 U.S.C. 2201 (i) (3).

(4) Moreover, Section 161(i), contrary to appellants' contention, *does* authorize the issuance of regulations applicable to persons who, like himself, are "strangers" to the atomic energy program. Subclause (1) permits regulations "to protect Restricted Data received by *any* person." Subclause (2) authorizes the Commission "to guard against the loss or diversion of special nuclear material * * * and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security." But the diversion of special nuclear material may result from its being stolen by "strang-

ers'' to the atomic energy program. If the Commission is to effectively guard against such diversion, it necessarily must have the power to regulate in a manner which will affect the activities of ''strangers'' as well as its employees, licensees, and licensee's employees. Similarly, the loss or diversion of special nuclear material may result in its coming into the possession of ''strangers'' as well as persons connected with the program. If the Commission is to effectively ''prevent any use or disposition * * * [of special nuclear material] which * * * [it] may determine to be inimical to the common defense and security'' again the activities of ''strangers'' must be affected as well as those of the program's personnel.

Finally, under subclause (3) the Commission is charged with the responsibility ''to govern any activity authorized pursuant to this Act * * * in order to protect *health* and to minimize danger to *life* or *property.*'' Since the activity authorized pursuant to the Act may, in the absence of power to provide for proper safeguards, jeopardize the health of, or be dangerous to the lives and property of ''strangers'' as well as participants in the program, it is reasonable to assume that Congress charged the Commission with responsibilities in this respect toward both. But to fulfill these responsibilities effectively, the Commission must have been given the power to regulate in a manner which will affect the activities of each class. Thus, each of the subclauses of Section 161(i) expresses a purpose which the Commission would not be able to effectively accomplish without the authority to

issue regulations affecting "strangers." This circumstance, we submit, compels the conclusion that such authority was comprehended by enactment of the Section.

(5) Nor is it significant, despite appellant's suggestion to the contrary (Br. 29-31), that the only regulations which the Commission had issued under the authority of Section 161(i), prior to the April 11, 1958 Regulation, "pertained to activities of licensees and other persons authorized under the Act to engage in some part of the atomic energy program" (Br. 31). Merely because those regulations all related to the activities of licensees and were specifically applicable only to persons connected with the program is no reason why the Commission could not invoke the clear words of the statute by promulgating the regulation involved herein. Since the Commission deemed the regulation necessary to fulfill the responsibilities entrusted to it, it was proper, and indeed necessary to promulgate the regulation under the authority given it in Section 161(i).

C. The enactment of a separate trespass provision (42 U.S.C. 2278a (a)) did not preclude the Commission from acting under Section 161(i).

Appellant further contends (Br. 24-29) that the enactment of Section 229(a) of the Atomic Energy Act of 1954, as amended, (42 U.S.C. 2278a (a))—the so-called "trespass" section—precluded the Commission from acting under Section 161(i).

The trespass section referred to by appellant, however, was designed to give the Commission authority

"to issue regulations relating to entry upon * * * any facility, installation, or real property subject to the jurisdiction, administration or in the custody of the Commission." (42 U.S.C. 2278a (a)). In explaining the application of the trespass provision to specific instances, the Senate Report on the bill which later became Section 229 limits the property covered by the Section "to property in which the title is in the United States or * * * is leased by the United States for use of the Commission." (S. Rept. No. 2530, 84th Cong., 2d sess., p. 2). Since, in this case, the designated Danger Area to which the April 11, 1958 Regulation pertained was not owned or leased by the United States for the use of the Commission, the trespass section was clearly inapplicable. Regulations promulgated under the authority of the trespass section must necessarily relate to areas in which the United States has a proprietary or possessory interest and a prosecution for violation of such regulations would involve merely the punishment of an interference with that interest. Here, however, the Commission had no proprietary or possessory interest over the designated danger area which interest it was seeking to protect by issuance of the Regulation. Rather, to fulfill the responsibilities given it by the legislature, the Commission promulgated a regulation designed, *inter alia,* "to avoid any unnecessary delay or interruption of" an authorized Commission activity. By promulgating the Regulation the Commission, acting for the United States, did not seek to prevent the unauthorized entry upon an area owned

or leased by it (a necessary corollary of a trespass violation) but sought instead to exercise control over its own nationals, properly subject to the jurisdiction of the United States, both to protect their health and property and to prevent them from interfering with an activity important to the preservation of our national defense. Inasmuch as the regulation was expressly made applicable only to those persons owing allegiance to the United States, it was a proper exercise of jurisdiction though it pertained to an area outside of the territorial limits of the United States.[3] Cf. *Blackmer v. United States,* 284 U.S. 421; *United States v. Bowman,* 260 U.S. 94; *Cook v. Tait,* 265 U.S. 94.

The Regulation of April 11, 1958 was not designed simply to prevent unauthorized entry. It was promulgated to avoid unnecessary delay or interruption of the test activity and to protect the health and safety of the public. The presence in the Danger Area of an unauthorized vessel such as appellant's "Phoenix" would plainly delay the carrying out of the HARDTACK test series. Such a delay, in the view of the responsible officers of the Government, would be directly prejudicial to the defense interests of the United States. Moreover, entry into the Danger Area by such unauthorized individuals could, again in the view of responsible officials, result in the threatened compromise of Restricted Data and the diversion of special nuclear material as defined in the Act (42

[3]See *infra,* pp. 42-48, for a more detailed discussion of this point.

U.S.C. 2014(t)). It is obvious also that undetected entry into this area would constitute a serious hazard to the persons and property of the appellants. For these reasons, therefore, it is frivolous to contend that the contested regulation was a "mere trespass" provision.

By the clear words of the statutes themselves, it can be readily observed that the sections contemplate entirely unrelated problems. Under the trespass section, regulations could be promulgated which would prohibit a mere unauthorized entry[4] much like an unauthorized entry upon other government installations. On the other hand, Section 161(i) contemplates regulations promulgated to "protect Restricted Data"; "guard against loss or diversion of special nuclear material"; and "to govern any activity pursuant to this Act * * * in order to protect health and to minimize danger to life and property." The dangers to the proper accomplishment of these purposes, which Section 161(i) was designed to give the Commission authority to prevent could result from an infinite variety of circumstances. Of necessity, Congress intended to vest the Commission with authority to issue regulations when the accomplishment of those purposes is endangered by any of these circumstances. One such circumstance, which we submit might readily have been foreseen as presenting a danger to the section's purposes, is the presence of undetected or un-

[4]At the present time no implementing regulations have been issued under the authority of the trespass section and hence, because Section 229 is not self-executing, there could be no prosecution thereunder (See 42 U.S.C. 2278a (a)).

authorized persons in areas where Restricted Data, special nuclear material, or radiation in such quantity as to be injurious to health and property are located. Consequently, we think that it is reasonable to assume that Congress contemplated the issuance of regulations under the authority of Section 161(i), and to accomplish its purposes, governing locomotion or navigation through these areas. The only limitation, which is expressed in all three subclauses of the section, is that the regulations be issued only in connection with activities authorized by the Act.

The subsequent enactment of Section 229(a) did not, we submit, limit the Commission's authority under Section 161(i). To the extent that these sections might possibly overlap, no such case of overlapping is presented here, since, as we have previously noted (*supra,* pp. 21-23), Section 229(a) pertains only to areas in which the United States has a proprietary or possessory interest. In addition, Section 229(a) would authorize regulations to prevent entry upon Government property where no Restricted Data, or special nuclear material were located and which did not present a hazard to life or property whereas regulations prohibiting entry issued under the authority of 161(i) must be related to the accomplishment of the purposes of that statute. The contested regulation was clearly so related.

Moreover, the interests to which each of the purposes of Section 161(i) pertain are all highly important to the national defense of the United States and the health and well-being of its citizens. They are

all far superior in our hierarchy of values than the mere interest in protecting the property owned by our government. Consequently, the penalty provided as a deterrent to those who would jeopardize those interests could, quite conceivably, be made more severe than in the latter case.

In any event, the mere fact that a person could by one act conceivably violate two regulations issued under Sections 161(i) and 229(a) respectively, would not preclude the Government from electing to proceed under either or both. So long as the offenses defined in the statute (as implemented by the regulations) were not identical, prosecution could be instituted under both. *Kendrick v. United States,* 238 F. 2d 34, 36 (C.A. D.C.); *Perry v. United States,* 227 F. 2d 129 (C.A. 5). And, as pointed out in *Ehrlich v. United States,* 238 F. 2d 481, 485 (C.A. 5):

> It is settled law, United States v. Gilliland, 312 U.S. 86, 61 S. Ct. 518, 85 L. Ed. 598, that where a single act violates more than one statute, the government may elect to prosecute under either. A defendant cannot complain merely because the charge against him is brought under the statute carrying the more serious penalties when two statutes punish the same general acts (citing cases).

Assuming, therefore, that a case were presented, wherein (because the tests were being conducted on property owned or leased by the United States) regulations preventing entry could have been promulgated under both Sections 161(i) and 229(a), but only one

regulation was issued and that under 161(i), it is a clear corollary to the rules set forth by the cases cited above, that a person violating the regulation could not complain that it was issued under the statute carrying the greater penalty. Appellant's argument, in the context of the circumstances presented in this case, places him in no better position.

II.

SECTION 161(i), AS INTERPRETED BY THE GOVERNMENT, IS NOT TOO VAGUE AND INDEFINITE TO SUPPORT CRIMINAL PENALTIES ATTACHED TO VIOLATIONS OF REGULATIONS PASSED PURSUANT THERETO. NOR IS IT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO AN ADMINISTRATIVE AGENCY.

Appellant next contends (Br. 34-42) that "Section 161(i), as interpreted by the Government, is constitutionally too vague and indefinite to sustain the attempted criminal regulation." (Br. 34). He makes no claim that, either the Section itself (see Br. 41) on its face, or the April 11, 1958 Regulation (see Br. 39, n. 15) implementing it, are unconstitutionally vague and indefinite.[5] He argues rather that, as interpreted by the Government, Section 161(i) is as broad as Section 161(q) (42 U.S.C. 2201(q)) which grants the Commission general authority to "make, promulgate, issue, rescind and amend such rules and

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[5]Though appellant suggests that some aspects of the regulation "were unquestionably vague and without intelligible standards," he specifically refrains from claiming that it was unconstitutionally vague (Br. 39, n. 15).

regulations as may be necessary to carry out the purposes of this Act" and to which, because of the Congressional awareness of constitutional infirmities which might ensue, no criminal sanctions were attached.[6] In addition, appellant argues that if Section 161(i) is to be afforded the interpretation placed upon it by the Government, it would then constitute an unconstitutional delegation of legislative power to an administrative agency. We submit that both of these contentions lack merit.

As appellant accurately reports (Br. 35-37) Congress, in enacting the general penal provision contained in Section 223 of the Act (42 U.S.C. 2273) was careful not to make it applicable to violations of regulations issued under the general grant of authority contained in Section 161(q) (42 U.S.C. 2201(q)). The purpose and effect of this latter provision are clearly set forth in the following passage from the Senate Report on the bill which later was enacted and is now Section 161(q) (S. Rept. No. 603, 83rd Cong., 3d Sess., p. 4):

> Section 7 of the bill gives the Commission power to issue rules and regulations under the Atomic Energy Act. This is a power ordinarily granted to administrative agencies, and the Atomic Energy Commission has heretofore frequently acted on an implied grant of such power. It is thought

[6]Since appellant assumes that the Commission, in promulgating the regulation, acted solely under the authority granted in subclause (3) (Br. 16) his argument here is confined to the Government's interpretation of that subclause. As we have attempted to show in our argument under Point IA, *supra,* pp. 5-11, this assumption is unfounded.

> desirable to spell out this power in statutory form so there could be no question of the authority to issue rules and regulations.
>
> Since the criminal provisions of the Atomic Energy Act do not apply to infractions of general rules and regulations, this section would not enlarge any powers of the Atomic Energy Commission to issue rules and regulations which would subject violators thereof to criminal punishment.

As the Senate Report points up, therefore, Section 161(q) is a mere housekeeping provision, very much like general regulatory authority granted to other agencies of the government, designed to authorize regulations pertaining to the internal affairs of the Commission. Unlike Section 161(i) which provides for the issuance of regulations only for specified purposes, criminal sanctions do not attach to regulations issued under 161(q). To equate 161(i)—a statute designed to protect national security and to safeguard the health and welfare of the people, however, with Section 161(q), a mere housekeeping provision, as appellant would have us do, is to ignore the very purpose for which each section was enacted.

Appellant argues, however, that, as interpreted by the Government, Section 161(i) is as broad and indefinite as Section 161(q). His argument rests upon the Government's interpretation of subclause (3), since, in his view, that subclause constituted the sole basis of the Commission's exercise of authority in promulgating the April 11, 1958 Regulation. Specifically, appellant challenges an interpretation of sub-

clause (3) which would read it as authorizing regulations "to govern any activity authorized pursuant to this Act * * * in order to protect health and to minimize danger to life and property" (See 42 U.S.C. 2201(i)(3)). It can be readily seen by comparison of this standard with the general language used in Section 161(q) (42 U.S.C. 2201(q)), however, that it much more clearly delineates the permissible area of regulatory authority than is the case with respect to the language used in the latter Section. Subclause (3) authorizes regulations, in connection with any activity authorized under the Act, to carry out a single specific purpose expressed in the subclause itself—*i.e.*, "to protect health and to minimize danger to life and property." Under Section 161(q), however, the Commission may promulgate any regulations which pertain to the administration of its internal affairs. Thus, even as interpreted by the Government, it is apparent that subclause (3) of Section 161(i) does not contain the broad general grant of authority which characterizes Section 161(q).

It is true, of course, that a vague and indefinite statute—that is, one under whose terms "men of common intelligence must necessarily guess at its meaning and differ as to its application"—violates the right to due process. *Lanzetta v. New Jersey,* 306 U.S. 451, 453. However, such general terms as "public interest," "public convenience, interest or necessity," and "excessive profits" have been held to constitute a sufficient standard to satisfy the constitutional requirements. *New York Central Securities Co. v.*

United States, 287 U.S. 12, 24; *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 138; *Lichter v. United States,* 334 U.S. 742, 763. The standard set forth in subclause (3) of 161(i) is, we submit, no less definite and certain than those upheld by the Supreme Court in these cases.

Appellant further argues, however, that, as construed by the Government, subclause (3) should be held to be too vague since, allegedly, he "could not have known from looking at the statute whether it authorized the Commission to issue the contested regulation" (Br. 40). But that circumstance, even if assumed for present purposes to be a fact, is of no aid to appellant. A similar argument was considered and rejected by the Supreme Court in *United States v. Grimaud,* 220 U.S. 506. That case involved the validity of an indictment issued upon a violation of a regulation promulgated by the Secretary of Agriculture. The Court said (at page 521):

> It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep upon a forest reserve. But the statutes, from which we have quoted, declare, that the privilege of using reserves for "all proper and lawful purposes" is subject to the proviso that the person so using them shall comply "with the rules and regulations covering such forest reservations." * * *
>
> If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of Government property. In doing so they

thereby made themselves liable to the penalty imposed by Congress.

Implementation of subclause (3) (as well as (1) and (2)) of Section 161(i) by a regulation of the type with which we are concerned in this case (*i.e.*—a regulation prohibiting unauthorized entry) is, we submit, even more readily comprehended by the language of subclause (3) than the implementation of the statute upheld in the *Grimaud* case, *supra.* The important factor in such circumstances is whether the regulation itself clearly spells out the prohibited activity and, as appellant himself concedes, there was nothing vague or indefinite about the regulation of April 11, 1958. The persons and area affected by the regulation and the length of time in which it was to remain in force and effect were clearly set forth in the regulation itself. Certainly, "men of common intelligence" would not "necessarily guess at its meaning and differ as to its application." *Lanzetta v. New Jersey, supra,* at page 453.

Finally, appellant argues that even if the clarity of the regulation could cure the constitutional defects of a statute which might raise some doubt regarding the manner in which it could be implemented, the vague grant of criminal regulatory authority (which he suggests is presented in this case) raises questions concerning the possible unconstitutional delegation of legislative power to an administrative agency.

It is elementary that a valid legislative regulation, that is, one made pursuant to constitutional and statu-

tory authority, has the same force as though prescribed in terms by statute. *Atchison, T. & S.F. Ry. Co. v. Scarlett,* 300 U.S. 471, 474; *Tyson v. Commissioner of Internal Revenue,* 68 F.2d 584, 587 (C.A. 7), certiorari denied, 292 U.S. 657; *E. Griffiths Hughes, Inc. v. Federal Trade Commission,* 63 F.2d 362, 363 (C.A. D.C.). Moreover, a legislature may authorize an executive officer or body to make rules and regulations for the purpose of carrying out the objects of a statute and may make a violation of such rules a criminal offense. *United States v. Grimaud,* 220 U.S. 506; *General Motors Corp. v. Blevins,* 144 F. Supp. 381, 396 (D. Colo.). The only limitation upon this power is that Congress, in delegating to the President or to an administrative agency the power to implement by regulation a broad policy laid down by statute must adopt an intelligible standard to which administrative action must conform. *Sunshine Coal Co. v. Adkins,* 310 U.S. 381, 398; *United States v. Rock Royal Cooperative,* 307 U.S. 533, 577. As we have attempted to show (*supra,* pp. 29-30) subclause (3) of Section 161 (i) provides such a standard and, moreover, we think that our reasoning applies with equal force and effect to subclauses (1) and (2). Certainly, if in *Yakus v. United States,* 321 U.S. 414, 420, the Supreme Court could sustain a conviction for violation of a regulation issued pursuant to authority granted to the administrator to issue such regulations which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act," there is little danger that a conviction for the violation of the regu-

lation in this case is violative of due process. In the *Yakus* case, *supra,* at 423, the Court upheld the grant of authority to issue regulations fixing prices, upon a finding that the specified purposes of the Emergency Price Control Act of 1942 (involved in that case) clearly denoted the objective to be sought by the Administrator in fixing prices and contained sufficient standards defining the boundaries within which prices having that objective were required to be fixed. The general purposes of the Atomic Energy Act of 1954 are contained in Section 3 of the Act (42 U.S.C. 2013). Among these purposes are *(ibid.)*

"to provide for—

* * * * *

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use and production of atomic energy and special nuclear material so directed as to make maximum contribution to the common defense and security and the national welfare;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public."

Section 161(i) of the Act contains standards which are no less definite in delineating the boundaries

within which regulations having the objectives specified by these enumerated purposes may be promulgated than those which were contained in the Emergency Price Control Act had in relation to the objectives specified in that statute. In addition, the Court, in *Yakus* (at p. 424) distinguished *Schechter Corp. v. United States,* 295 U.S. 495; (cited by appellant, Br. 40) by noting that no standards were provided in the *Schechter* case. Moreover, "[t]he function of formulating the codes [in that case] was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated." See also, *Fahey v. Mallonee,* 332 U.S. 245; *Sunshine Coal Co. v. Adkins, supra,* at page 331.

In view of the standards, previously upheld by the Supreme Court, it is clear that the standards set forth in Section 161(i) (3) as well as (1) and (2) are clear and definite enough to withstand the test of constitutional validity. Certainly, a statute which declares that regulations can only be issued in connection with activity authorized pursuant to the Act "in order to protect health and to minimize danger to life and property" sets forth a no less definite standard. The regulation of April 11, 1958 contained a specific prohibition which the defendant wilfully violated. Criminal penalties for the violation of such a regulation are specifically provided for in the Act itself (42 U.S.C. 2273). Since the regulation was promulgated in the exercise of a lawful authority, and since the defendant wilfully violated the regulation, criminal penalties must attach to his act.

III.

THE PACIFIC NUCLEAR TESTS AND THE REGULATION UNDER WHICH APPELLANT WAS CONVICTED VIOLATE NO INTERNATIONAL COMMITMENTS OF THE UNITED STATES.

A. Appellant contends that the Pacific nuclear tests and the regulation violate international commitments of the United States, to wit, the so-called "human rights provision" of the Charter of the United Nations, the Trusteeship Agreement for the Territory of the Pacific Islands and the principle of freedom of the seas which the United States is committed by international law to respect. Having established these violations by allegation (not sustained by evidence), appellant then argues that Congress never intended to authorize the tests or the contested regulation because a contrary construction would ascribe to Congress an intent to abrogate the international commitments of the United States.

1. The Charter of the United Nations, as any other treaty, is a compact between sovereign nations. The Charter provisions relied upon by appellant are not self-executing and they vest no private legal rights in the appellant:

> "The question whether our Government is justified in disregarding its engagements with another nation is not one for the determination of the Courts."

The Chinese Exclusion Case, 130 U.S. 581, 602; *Whitney v. Robertson,* 124 U.S. 190, 194; *Botiller v. Dominguez,* 130 U.S. 238, 247; *Head Money Cases,* 112 U.S. 580, 598.

But even if the Court should disagree with our argument in this respect, we show here that appellant's attack on the Act (and Regulation) on this ground is without merit.

Even if it were true that the Act conflicts with the Charter of the United Nations, the Act, being equally with the Charter "the supreme Law of the Land" (Const., Art. VI, cl. 2) and being later enacted, would supersede any conflicting provisions of the Charter. As stated in *Reid v. Covert,* 354 U.S. 1, 18: "This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." To the same effect are *Head Money Cases, supra,* at 598-9; *The Chinese Exclusion Case, supra,* at 600; *Whitney v. Robertson, supra,* at 194.

What the appellant characterizes as the "human rights" provision of the Charter are Article I, paragraph 3, and Articles 55 and 56 (59 Stat. 1037, 1045-6).[7] These general objectives are obviously not

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[7]Article 1

The Purposes of the United Nations are:

* * * *

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;

* * * *

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations

self-executing. As stated in *Sei Fujii v. State of California,* 38 C.2d 718, 722-3, 724, 242 P.2d 617, 620-2:

> It is clear that the provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. Article 55 declares that the United Nations "shall promote: * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," and in Article 56, the member nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated

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among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

The language used in Articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals . . .

* * * * * * *

The provisions in the charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations . . .

Since these provisions of the Charter are not self-executing, they do not confer any rights enforceable by the Courts. As stated in *Foster v. Neilson,* 2 Pet. 253, 314:

. . . Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.

See also, the *Sei Fujii* case, *supra.* Even if these provisions of the Charter were, however, deemed to be self-executing, it is plain that they do not constitute a commitment by this Government to refrain from taking any measure which Congress may deem appropriate to the national defense.

2. Chapter XII of the Charter of the United Nations establishes an "International Trusteeship System" (59 Stat. 1048-50).[8] The Trusteeship System is made applicable to territories placed thereunder by means of trusteeship agreements (Art. 77). The trusteeship agreement is required to include the terms under which the trust territory is administered and to designate the administering authority (Art. 81). A trusteeship agreement may designate "a strategic area or areas" in the trust territory to which the agreement applies (Art. 82). All functions of the United Nations relating to such strategic areas are exercised by the Security Council (Art. 83).

The Trusteeship Agreement for the Trust Territory of the Pacific Islands[9] was approved by the Security Council of the United Nations on April 2, 1947, and was approved by the President on July 18, 1947 (61 Stat. 3301). The President's approval was authorized by a joint resolution approved July 18, 1947 (61 Stat. 397).

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[8]The relevant provisions of the Charter are set forth in the Appendix, pages iii-iv, *infra.*

[9]The relevant provisions of the Trusteeship Agreement are set forth in the Appendix, pages i-iii, *infra.*

This agreement places the Pacific Islands formerly held by Japan under League of Nations mandate (which included Eniwetok and Bikini) under the trusteeship system, designates this territory as a strategic area, and designates the United States as the administering authority (Arts. 1, 2). See *Callas v. United States,* 253 F. 2d 838 (C.A. 2). The United States is given "full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement" and is entitled to establish military bases and fortifications and station armed forces in the territory (Arts. 3, 5). The agreement specifically provides that areas of the territory "may from time to time be specified by it [the United States] as closed for security reasons" (Art. 13). During discussion of this agreement in the Security Council, the American representative stated this Government's position that Article 13 authorizes it to close areas of the Trust Territory, and that article was unanimously adopted by the Security Council (extract from the official records of the Security Council, 124th meeting, 2 April 1947 is set forth in the Appendix, pages v-vi, *infra*).

Accordingly, it is clear that the closing of the Pacific Proving Grounds in connection with the nuclear weapons tests is in accordance with the Charter of the United Nations.[10]

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[10]The appropriate forum for the hearing of complaints of violation of the Trusteeship Agreement is the Trusteeship Council of the United Nations. As is stated in Appellant's Brief, such a complaint was made in May 1954 and was rejected by a resolution of the Council on March 29, 1956. In July 1956 the Atomic

3. Next, appellant asserts that the closing off of a danger zone of 390,000 square miles of the Pacific Ocean is a massive invasion of the international freedom of the high seas. In the first place, the general statements about freedom of the seas contained in Appellant's Brief (pages 51-55) do not have the status of treaties, which are part of "the supreme Law of the Land" (Const., Art. VI, cl. 2). In the second place, even if it were shown that the action of the Atomic Energy Commission is contravening some principle of international law, this appellant has no standing to raise the point, since the only redress for alleged violations of international law is by diplomatic negotiations between the nations affected (see *supra,* pp.

Energy Commission published a document entitled "Major Activities in the Atomic Energy Program, January-June 1956." At page 17 appears the following:

United Nations Trusteeship Council,
Weapons Tests.

After the Trusteeship Council of the United Nations received petitions protesting against testing nuclear devices in and near the Trust Territory of the Pacific Islands, Commission staff assisted the Department of State in preparing a reply.

In reply to the petitions, the United States stated that only after careful, serious and comprehensive studies was a decision reached to carry out the tests in the Marshall Islands; that the United States had earnestly sought a fully safeguarded international agreement that would make further tests unnecessary, but that until an agreement had been reached "elementary prudence required the United States to continue its tests;" but that every precaution would be taken to assure that fall-out would occur only in the danger area surrounding the Eniwetok Proving Ground which includes no islands inhabited by the Marshallese; that there was no need to evacuate the Marshallese from their home islands, that emergency evacuation plans had been formulated should such action become necessary; and that Marshallese were being trained in emergency health measures.

The United Nations Trusteeship Council on March 29 approved by a 9 to 4 vote a resolution approving the tests in the Marshall Islands, provided all necessary safeguards were taken.

36-40). In the third place, even if there were conflicts between the Atomic Energy Act of 1954 and some principle of international law, the Atomic Energy Act would prevail (see *supra,* p. 37).

Proper analysis demonstrates the lack of substance in appellant's contentions. The issue here presented is not Commission jurisdiction over the high seas, nor is it freedom of the seas; properly viewed, the issue for consideration is whether the Commission's power to issue regulations in implementation of its statutory responsibilities permits extraterritorial application of a regulation designed to safeguard an authorized Commission activity carried on outside the United States. We submit that insofar as such a regulation purports to cover only those persons subject to the jurisdiction of the United States, the Commission has that power.

There is no constitutional bar, nor is there one in international law, to the United States making its laws applicable to American citizens on the high seas or even in a foreign jurisdiction. It has long been recognized that this Government has extraterritorial jurisdiction over its citizens—a jurisdiction that is dependent upon the personal relationship of the citizen to his country of allegiance and not upon the geographic location of that citizen. The question, in short, is not whether there is power to extend municipal law to citizens beyond the territorial confines of this country but rather whether Congress has intended to make such an extension. See *Blackmer v. United States,* 284 U.S. 421; *United States v. Bowman,* 260 U.S. 94; *The Appollon,* 9 Wheat (22 U.S.) 362; *Cook v. Tait,* 265

U.S. 47; *United States v. Bennett,* 232 U.S. 299; see also, II Moore, *International Law Digest,* pp. 255-256; I Hyde, *International Law,* p. 424.

The principles of law applicable in this regard were summarized by the Supreme Court in *Blackmer v. United States, supra,* at page 421, a case which sustained the reach of domestic law to an American citizen residing in a foreign country and the imposition of criminal sanctions as a consequence thereof. In *Blackmer* the Court stated (284 U.S. at 436-7):

> By virtue of the obligations of citizenship, the United States retained its authority over [defendant] and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States. *Cook v. Tait,* 265 U.S. 47, 54, 56. For disobedience to its laws through conduct abroad, he was subject to punishment in the courts of the United States. *United States v. Bowman,* 260 U.S. 94, 102. With respect to such an exercise of authority, there is no question of international law but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.

In fathoming legislative intent in the present case, it must be presumed that the provisions of the Atomic

Energy Act of 1954 are co-extensive in territorial reach with the activities authorized thereunder by the Congress. Cf., *United States v. Bowman, supra,* at 94, 101-102; *Maul v. United States,* 274 U.S. 501, 511. To determine then whether the regulatory powers granted the Commission can be exercised in such a manner as to be extraterritorial in scope, the activities which are to be implemented or safeguarded must first be examined. In the instant case, the elements militating for extraterritorial application are clear both from an examination of the relevant provisions of the Act and the pertinent legislative background.

Under Section 91(a) of 1954 Act, the "Commission is authorized to * * * conduct experiments and do research and development work in the military application of atomic energy" (42 U.S.C. 2121(a)). The phrase "research and development" is statutorily defined by Congress to include (42 U.S.C. 2014(v)):

> * * * (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials and processes.

Palpably then, the Act, as literally read, is broad enough in scope to embrace the type of nuclear test activities engaged in by the United States at Eniwetok and Bikini Atolls for the past twelve years. Moreover, both prior to the passage of the 1946 and 1954 Atomic Energy Acts, Congress was aware of the fact

that tests of this type could be conducted only beyond the territorial limits of the United States and that the Marshall Islands and surrounding waters were to be the site of such tests. The proposed holding of the first such test, Operation Crossroads, was detailed to the Special Senate Committee on Atomic Energy on January 24, 1946, during the course of that Committee's study of legislation to control the development and use of atomic energy (testimony of Vice Admiral W. H. P. Blandy, Hearing on S. Res. 179, Part 4, Special Committee on Atomic Energy, United States Senate, 79th Cong. 2d Sess.). Of particular interest in the present connection is the emphasis placed by that testimony on measures taken to protect health and safety, such as naval patrols "to keep ships out of the area for their own protection, and also to keep them away from contaminated water, water containing radioactive substances after the test as that water drifts westward" (*ibid.*). In succeeding years, reports of impending tests at the Pacific Proving Ground, and of the results of those tests, have been made by the Commission to the Joint Committee on Atomic Energy—in accordance with the statutory enjoinder to keep the Committee "fully and currently informed" (42 U.S.C. 2252)—and test activities have been communicated to the Congress itself through the agency's Semiannual Reports (42 U.S.C. 2016).[11] The Atomic Energy Act of 1954—and in particular Sec-

[11]See, e.g., Semiannual Reports dated Jan. 1953, pp. 16-17; July 1953, pp. 13-14; Jan. 1954, pp. 12-13; Jan. 1955, pp. 14-16; Jan. 1956, pp. 38-39; July 1956, p. 8; Jan. 1957, p. 11; Jan. 1958, pp. 276-277.

tion 91(a), *supra*—was enacted and implemented with that background. Furthermore, appropriations made by Congress for the maintenance and development of the facilities at the Pacific Proving Ground and the holding of tests there bear direct witness to a continuing legislative cognizance and affirmation of the extraterritorial activities conducted in accordance with the statutory mandate to carry out weapons tests.[12]

The extraterritorial scope of the test activities authorized by the Act having been established, it is a necessary corollary that the power to issue regulations to implement those activities and to safeguard their integrity is co-extensive in territorial reach. Thus, the powers granted the Commission to "prescribe such regulations or orders as it may deem necessary * * * to protect restricted data," or "to govern any activity authorized pursuant to this Act * * * in order to protect health and to minimize danger to life or property," or generally to "make * * * such rules and regulations as may be necessary to carry out the purposes of this Act" (42 U.S.C. 2201(i) and (q)), all must be read as authorizing regulations equal in reach to the statutory activities which they implement. A narrower reading would, in fact, contravene the plain language of the cited authorizations.

Accordingly, the regulation in issue, implementing as it does a statutorily authorized Commission function performed beyond the borders of the United States,

[12]See, e.g., Section 101(f)(5), Public Law 141, 84th Cong., 1st Sess. (69 Stat. 292).

is not subject to attack merely upon the ground that it too is extraterritorial in reach. This result is not altered by appellant's references to the "freedom of the seas" doctrine of international law. The doctrine on which they rely, whatever its application to the relationships between two nations or between one nation and the citizens of another, has never been thought to embody restrictions on a nation in dealings with its own citizens. To the contrary, a corollary of the "freedom of the seas" doctrine is the continuing amenability of an individual, while on the high seas, to the laws of the nation claiming his allegiance. See e.g., II Hackworth, *Digest of International Law,* p. 656 (quoting from *S. S. Lotus,* Permanent Court of International Justice); cf. *United States v. Bowman,* 260 U.S. 94; *Wilson v. McNamee,* 102 U.S. 572; *Maul v. United States,* 274 U.S. 501; *United States v. Rodgers,* 150 U.S. 249, 264.

B. We have attempted to show that there was no violation of any international commitments of the United States in the conducting of the tests or in the issuance of the regulations; moreover, *arguendo,* even if there had been, it would avail appellant naught.

We now turn for brief mention to a question of responsibility. The Commission is not only vested with *authority* to carry on activities such as the one in question and to issue implementing regulations (see *supra,* pp. 45-47), but it is affirmatively charged with *responsibilities*—responsibilities relating, *inter alia,* to the defense of the United States, the safeguarding of Restricted Data and the protection of the health and

safety of the public (cf., 42 U.S.C. §§ 2011-2013, 2037, 2121, 2153, 2161-2165). The instant regulation was issued in discharge of these responsibilities. The presence in the Danger Area of an unauthorized vessel such as appellant's "PHOENIX" would plainly delay the carrying out of the Hardtack test series. Such a delay, in the view of the responsible officers of the Government would be directly prejudicial to the defense interests of the United States. Moreover, entry into the Danger Area by such unauthorized individuals could, again in the view of responsible officials, compromise Restricted Data as defined in the Act. Finally, it is obvious that undetected entry into this test area would constitute a serious hazard to the persons and property of the entrants. Appellant may insist that his safety is a matter for his sole concern; however, as we have heretofore stated, elemental considerations as well as the Commission's statutory responsibilities in this regard do not permit the agency to stand aside.

The Government submits therefore that the controverted restrictions were both necessary and lawful. The temporary nature of these limitations and their applicability in an area normally untraveled by those individuals subject to the regulation certainly does not detract from that conclusion. Appellant characterizes his proposed entry into the proscribed Danger Areas to a "protest" against the testing of nuclear weapons. Our form of government allows ample opportunity for protests against Government action within the framework of law. We think it a reason-

able statement, however, that the decision of the legislative and executive branches as to the necessity for such tests is not subject to a "protest" the nature and purpose of which is to interfere with that execution of that decision.

C. All the questions of law raised by appellant in III have been decided adversely in *Pauling v. McElroy,* 164 F. Supp. 390, 393.

IV.

APPELLANT WAS NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHTS UNDER THE REGULATION.

Appellant apparently has abandoned the argument which he made below that the Administrative Procedure Act (5 U.S.C. 1003) required an opportunity for notice and hearing before the promulgation of the regulation (R. 23, 355), but passing reference is made to this contention in his footnote 32 (Br. 64). Therefore no attempt will be made here to show that the issuance of the regulation complied with the Administrative Procedure Act. Instead, this argument will be included in the appelllee's answering brief in *Bigelow, et al. v. U.S.,* No. 16,018.[13] The appellee's argument here will be confined to the question of alleged deprivation of appellant's constitutional rights and to the question of the requirement of noticing and hear-

[13]Appellants' Brief in *Bigelow* adopts the arguments of appellant here numbered I through IV. Additionally, the *Bigelow* appellants argue that the Regulation was void because of the failure of A.E.C. to comply with the Administrative Procedure Act's notice and hearing requirements.

ing as a matter of constitutional due process. Appellant contends that the regulation infringes upon his freedom of protest under the First Amendment, as well as upon his freedom of movement under the Fifth Amendment. We do not argue here with the general statements appellant makes regarding these fundamental rights, or with the authorities cited. However, appellant *assumes* that these rights are absolute. That they are not needs no citation of authority. The right to travel, for instance, cannot be denied on the grounds of one's beliefs or associations, but can for reasons that are good and sufficient.[14] The same principles apply to the so-called right to protest. As we have already shown (see *supra,* pp. 5-6, 48-49), the Commission issued the regulation in the discharge of its responsibilities—responsibilities relating, *inter alia,* to the defense of the United States, the safeguarding of Restricted Data, and the protection of the health and safety of the public. The Government submits, therefore, that the controverted restrictions were both necessary and lawful. The temporary nature

[14]The situation here is to be distinguished from that in *Kent v. Dulles,* 357 U.S. 116. The following considerations should be borne in mind in connection with the instant case: here, there is involved a restriction applicable to *all* persons subject to the jurisdiction of the United States; this restriction is applicable for only a limited period of time; further, such action is necessary to prevent interference with a statutorily authorized activity and for the protection of health and safety, as directed by Congress. Finally, the disputed restriction applies in an area rarely entered by U.S. citizens for either travel or business. In short, for those individuals who desire to travel through this danger area to reach another destination, the necessity to by-pass it can only be a matter of temporary inconvenience; only those persons who wish to enter the area to interfere with this Government's statutorily authorized nuclear test can be said to be frustrated in their venture.

of these limitations and their applicability in that area normally untraveled by those individuals subject to the regulation certainly does not detract from that conclusion.

Appellant states that the regulation was aimed solely at the crew of the "GOLDEN RULE" (and any others who might contemplate travel into the danger area as a means of public protest against testing).[15] He then concludes that the promulgation of the regulation was an "adjudicatory" rather than a "legislative" function, and that therefore the due process clause of the Fifth Amendment required notice and hearing regardless of any exceptions provided by the Administrative Procedure Act.

The fact that there was no evidence in the Court below regarding the "GOLDEN RULE" or the circumstances surrounding the issuance of the regulation coupled with the presumption that a commission charged with a duty has regularly, and consistent with the law, performed the same and has not acted arbitrarily in violation of the law, should be a sufficient answer to this argument. However, *arguendo,* we will assume the truth of the facts (not conclusions) alleged by appellant re the circumstances surrounding the issuance of the regulation. These facts still do not lend themselves to the conclusion that the issuance of the regulation was an "adjudicatory" rather than "legislative" action. The regulation was not aimed specifically at the members of the crew of

[15]See R. 358—appellant now adds for the first time the matter contained parenthetically here.

the "GOLDEN RULE" although their actions may have prompted the promulgation of the regulation.

One thing should be beyond cavil—it was not aimed at Earle L. Reynolds, appellant herein, who upon his arrival in Honolulu in May, 1958, subsequent to the issuance of the regulation, hadn't the slightest intention of making a protest voyage to the danger area (R. 419-20, 422-5). All United States nationals alike were affected by the regulation and nothing that the "GOLDEN RULE" crew or appellant here had done, as yet, was declared illegal. Rather, what was proscribed by the regulation was future conduct of any national who might choose to enter the danger area. This situation has no similarity to the quasi-judicial proceedings reported in *Philadelphia Company v. S.E.C.,* 164 F.2d 889, 175 F.2d 808, discussed by appellant (Br. 66-68).

In *American Communications Association v. Douds,* 339 U.S. 382, the Court upheld the validity of Section 9(h) of the National Labor Relations Act in the face of an attack made upon the grounds that the section was violative of the Constitution as a Bill of Attainder. The Court said (*id.* at 414):

> Here the intention is to forestall future dangerous acts; there is no one who may not by voluntary alteration of the loyalty which impels him to action, become eligible to sign the affidavit. We cannot conclude that this section is a Bill of Attainder.

Here, by the same token, the intention of the Commission was to forestall *future* action. Since past ac-

tion of the appellant was not declared unlawful by the Commission, by application of the rationale in *American Communications Association v. Douds, supra,* the regulation cannot be considered a Bill of Attainder or an "adjudicatory" action.

It is not disputed here that the action of the appellants in the *Bigelow* case (see *Bigelow, et al. v. U.S.,* No. 16,018) prompted the Atomic Energy Commission to issue the regulation here in issue.

However, the fact that this knowledge may have prompted the regulation in no way impairs the validity of the regulation itself. Indeed, it has been said:

> One step in the discovery of legislative meaning or intent is the ascertainment of the legislative purpose, i.e., the reasons which prompted the enactment of the law. * * * In seeking to ascertain the legislative purpose it is proper to look at the circumstances existing at the time of the enactment of the statute, to the necessity for the law, the evils intended to be cured by it, to the intended remedy, and to the law as it existed prior to such enactment. *Otoe and Missouria Tribe of Indians v. United States,* 131 F. Supp. 265, 272, certiorari denied, 350 U.S. 848.

It has repeatedly been held also that resort to Legislative History is proper to ascertain the legislative intent. See *United States v. Great Northern Ry.,* 287 U.S. 144; *Duplex Printing Press v. Deering,* 254 U.S. 443.

Indeed, the legislative history of many of our statutes contains recitals setting forth reasons prompting the passage of such acts.

Certainly if judicial pronouncements condoning the practice of inquiring into the contemporaneous events to determine Congressional intent have been made, the very fact that these events prompted the passage of the act could not in any way affect the validity of the act itself.

Judicial recognition has also been accorded to events which prompted legislation directed at particular groups of individuals. In *Galvan v. Press,* 347 U.S. 522, the Court took cognizance of the events which prompted the enactment of the statute:

> On the basis of extensive investigation Congress made many findings, including that in § 2(1) of the [Internal Security] Act that the "Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary to establish a Communist totalitarian dictatorship," *and made present or former membership in the Communist Party, in and of itself, a ground for deportation* (emphasis supplied).

And again in *American Communications Association v. Douds, supra,* at 389 the Court noted:

> It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when

the dictates of political policy required such action.

Certainly the very acts of those individuals who would be affected by the statute prompted enactment of the legislation, and in no way whatsoever impaired the validity of the statute.

Analogously, contemporary events, relating to the promulgation of a regulation can be resorted to in order to ascertain the purpose of a regulation, and these events can be the motivating factors for the regulation itself.

V.

THE REFUSAL OF THE COURT BELOW TO GRANT A CONTINUANCE DID NOT UNDER THE CIRCUMSTANCES DEPRIVE APPELLANT OF ANY OF HIS CONSTITUTIONAL RIGHTS; HOWEVER, THE COURT'S REFUSAL TO PERMIT APPELLANT TO PROCEED IN PROPRIA PERSONA WAS ERROR.

A. Refusal of continuance.

Because appellant's brief presents an erroneous statement of the facts, unsupported by the record, it is necessary to restate here the course of the proceedings below.[16]

The appellant was arrested July 2, 1958, and committed by the U.S. Commissioner on July 8, 1958. The

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[16]The government does not quarrel with the basic proposition relied upon by appellant in his brief that a defendant may not be arbitrarily deprived of his right to counsel. The government only objects to appellant's attempt to distort the constitutional right to counsel into a club for the intimidation of the trial court. It will be noted that every one of the cases cited by appellant treats the Sixth Amendment, not as a weapon to be used as the defendant sees fit, but as a shield to protect the defendant against unfair prejudice.

appellant first appeared before the trial Court on July 21, 1958. He appeared with his chosen attorney (R. 2).[17] Appellant informed the Court that he wished to waive indictment (R. 3) and consent to prosecution of the instant case by information, which the Court permitted him to do (R. 5). He was thereupon arraigned. He then asked for and obtained a one-week continuance to plead or otherwise move (R. 5). The Government did not object to this short continuance but announced that it was prepared to afford the defendant his right to a speedy trial (R. 5).

The following day, July 22, 1958, appellant appeared again with counsel to ask the Court for permission to travel to Kwajalein (R. 6-10). This request was denied as premature, in that appellant had not made travel arrangements (R. 10).

On July 28, 1958, appellant's counsel filed a motion to dismiss (R. 21), noticed for hearing on August 6, 1958 (R. 308).

Also on July 28, 1958, appellant appeared before the Court with counsel to request permission to travel to Los Angeles, New York, and the District of Columbia, for the purpose of seeking additional (R. 43, 45)

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[17]Appellant states in his brief (at p. 68) that ". . . since he was immediately confronted with the prospect of indictment and criminal proceedings, appellant retained a local counsel, Mr. Katsugo Miho, not to undertake the defense of any subsequent criminal action, but only to handle preliminary matters . . ." Yet both appellant and Miho were fully aware of the fact that, absent a waiver, there could not possibly be any preliminary matters to handle, until after the next meeting of the grand jury, several months away (R. 321). This Court may wonder why appellant was so eager to get his case on the docket in July, yet so reluctant to have it go to trial a month later.

financial and legal assistance in his defense (R. 43-48). This request was granted (R. 48), counsel having assured the Court that the trip would not be a cause for delay (R. 44). Appellant made the trip and secured the services of Mr. Rauh (R. 321-322) as associate counsel.[18] Mr. Rauh did not enter an appearance for appellant, however, until September 25, 1958, for reasons personal to himself (R. 134, 329).

On August 6, 1958, the date noticed for the hearing on the motion to dismiss the information, appellant's counsel sought a continuance on the ground that he preferred to have his co-counsel, Mr. Rauh, argue the points of law raised.[19] The continuance was denied, the Court being of the opinion that co-counsel's presence was not necessary, since the issues involved could be raised again at trial, post-trial and appellate stages if the motion should be denied (R. 308).

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[18]Appellant now protests that this is not so; that Mr. Rauh was primary counsel and Mr. Miho was actually retained only for preliminary matters. It is significant, however, that neither appellant nor Mr. Miho mentioned this usual arrangement until the very eve of trial (R. 147) and *after* Mr. Rauh had entered the scene. In fact the record shows that they considered Mr. Rauh to be nothing more than co-counsel (R. 6, 16, 43, 45, 53, 86, 90, 97, 98, 103, 113), and also shows that Mr. Miho expected to try the case from the beginning (R. 91, 103, 106-110). Subsequent representations to the contrary could hardly be taken at face value by the Court.

[19]Appellant's brief alleges (at p. 69) that his counsel, Mr. Miho, secured an agreement from the U.S. Attorney's office to postpone this hearing to September 6, citing appellant and his counsel. The Government respectfully avers that the appellant is mistaken. The Government, of course, although it did not oppose the first continuance, could not consent to the repeated attempts to delay the trial, because its main witness was LCDR A. J. Bush, the commander of the U.S.C.G. Cutter Planetree. The Planetree obviously could not remain in port indefinitely, waiting for the trial.

The motion to dismiss was heard on August 6, 1958, and denied, whereupon appellant pleaded not guilty to the information, and his counsel requested a trial date subsequent to the return of appellant's yacht from Kwajalein (R. 89-90). The Government objected to delay on the ground that appellant had not made a showing that he needed the testimony of the persons aboard the yacht (R. 92).

The Court continued the matter of setting to August 11, 1958, to give the parties an opportunity to resolve the matter of the appellant's witnesses (R. 93-94). On August 11, 1958, the Government offered, and the Court ordered, an election to proceed only upon the substantive charge, thereby obviating the alleged necessity of delaying the trial to permit the attendance of persons aboard appellant's yacht (R. 126).

Failing to obtain a delay until the yacht's arrival, appellant's counsel raised on August 11, *for the first time,* the alleged inability of proposed co-counsel, Mr. Rauh, to appear in Hawaii until late September (R. 103). The Court was understandingly unwilling to accept appellant's unsubstantiated and unspecific representations (R. 113-114) regarding this matter, particularly since Mr. Rauh had not entered an appearance at the time. The Court having refused to adjust its calendar to the convenience of Mr. Rauh (R. 127), counsel informed the Court that he would be prepared to go to trial on August 25, 1958 (R. 123, 128), and the trial was set for that date (R. 129).

On August 18, appellant's counsel filed a motion for continuance (R. 130) to September 24, 1958, an unavailable date (R. 169, 313). The motion was supported by Mr. Rauh's affidavit, which set forth in general terms his reasons for not wanting to appear for appellant on the date set for trial (R. 133-135).

This affidavit alleged that proper attention to appellant's case, including travel time, preparation, and the trial itself, would require one week (R. 135).[20]

The affidavit further alleged that during the week prior to August 25, Mr. Rauh was planning a vacation, and that during the week of August 25, he planned to write a brief that was not due until October (R. 134, 146). These two activities, which Mr. Rauh evidently considered more important than his obligations to his client, were advanced by him and by appellant as considerations compelling further delay of the trial. It is understandable that the Court was disinclined to agree.

Appellant's motion for continuance was noticed for August 20 (R. 136), only five days prior to the trial. *It was at this hearing virtually on the eve of trial that counsel first alleged (either on or off the record) that he had not been retained to defend appellant* (R. 147-148).[21] Mr. Rauh having satisfied the Court

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[20]It will be noted that appellant does not complain that his counsel were given insufficient time to prepare for trial, but only that one of them, Mr. Rauh, was unavailable to him on the trial date itself.

[21]The late appearance of this allegation, on which appellant's brief relies heavily, must have contributed to the Court's view that it was not advanced in good faith, particularly in view of the repeated references by appellant and counsel to "additional

that he could, if he so wished, adjust his personal calendar to the needs of the Court (R. 134, 146), and counsel having again assured the Court that he was prepared to go to trial at the appointed date, the continuance was denied (R. 154).

The following day, August 21, appellant filed a "Notice of Discharge" addressed to the trial judge and stating, without explanation, that appellant had discharged Fong, Miho & Robinson as his attorneys (R. 155). On August 22, appellant's counsel, Mr. Miho, appeared with appellant and asked for leave to withdraw, explaining that appellant had been advised of the consequences of the withdrawal, yet still desired it (R. 157-160).

In response to inquiry by the Court, appellant explained the discharge of counsel as follows:

> "I feel I have put Mr. Miho into an intolerable situation. I don't believe he anticipated he would be required to plead this case at trial. He, of course, is prepared to do it.
>
> "The onus is on me to ask him to retire, which I did. This doesn't represent in any way any dissatisfaction with Mr. Miho's services. They have been quite satisfactory. It is a matter—matter of principle" (R. 161-162).

Appellant further stated that he was not requesting a continuance and that since Mr. Rauh had refused

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counsel," "co-counsel," etc., throughout prior proceedings (R. 43, 45, 86, 90, 95, 97, 98, 103, 104, 113). As appellant obliquely indicates in his brief (at p. 74, footnote 40), it is accepted practice in the Court below for local counsel to appear generally throughout the litigation, even when out-of-state counsel is associated to assist at trial.

to appear on August 25, he was ". . . prepared to go to trial without counsel. I assume that is my penalty for this decision" (R. 162).

Having been thus advised by appellant that appellant's sole reason for the discharge was to relieve Mr. Miho of an obligation he felt Mr. Miho had not knowingly incurred, and having been assured also that appellant was entirely satisfied with Mr. Miho, and having been informed of the part that Mr. Rauh had played in the matter (R. 164), the Court was of the opinion that appellant's discharge of counsel was not motivated by a desire to do without Mr. Miho's services (R. 170-171), and further that appellant's interests would not be served by allowing the withdrawal (R. 171-172).

The Court accordingly denied counsel's request for leave to withdraw and refused to permit appellant to defend in *propria persona,* rendering an oral opinion (R. 167-172) and subsequently filing a Memorandum of Ruling (R. 306-315).[22]

On August 25, appellant appeared with counsel and trial by jury was had. At the outset of the trial counsel again requested leave to withdraw which request was denied (R. 177). Appellant then, having asked and obtained permission to speak for himself, asked for a four-week continuance (R. 178). This having been denied (R. 179), appellant, again speaking for himself, asked for a three-week continuance, which was denied (R. 180). The Government then presented

[22]This ruling raises another issue, which is discussed below, and which the government believes to be determinative of this appeal.

its case (R. 186-250), and appellant rested without offering evidence (R. 250).[23]

The following morning, August 26, appellant did not appear for the settling of instructions, leaving that matter exclusively to his counsel (R. 253-279).[24] The jury returned a verdict of guilty on August 26, 1958.

On these facts, certain conclusions are inescapable:

(1) Appellant employed Mr. Miho at the outset with the understanding that he would represent appellant throughout the litigation, being joined later by out-of-state co-counsel, if such could be arranged.

(2) Appellant subsequently retained Mr. Rauh to associate as co-counsel with Mr. Miho.

(3) Mr. Rauh attempted to force the Court below to conform its calendar to his convenience, and failing in that attempt he neglected to appear in appellant's trial.[25]

(4) Appellant discharged Mr. Miho and offered to proceed without counsel.

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[23]Appellant alleges in his brief that ". . . the District Judge consistently refused appellant's requests even to address the court." This, of course, is simply not so (R. 178, 180).

[24]This Court may note the fact with interest, since it is inconsistent with appellant's protestations that he did not regard or want Mr. Miho as his counsel.

[25]It will be noted that appellant's brief studiously avoids any discussion of the reasons for Mr. Rauh's failure to appear on the trial date, in spite of the fact that he was in telephonic contact with his client (R. 133) and presumably had ample notice and, by his own affidavit, ample time to prepare (R. 134). Indeed, Mr. Rauh himself, apparently aware of his awkward personal position, made only a half-hearted defense of himself when he argued before the Court below (R. 377-378).

In these circumstances, it cannot be said that there was anything improper in the Court's refusal to delay the trial from August 25, 1958, to a date that better suited Mr. Rauh's personal convenience. This is particularly so in view of the condition of the Court's calendar at the time.[26]

In any event the Court's denial of a continuance was fully justified by the fact that, although the requests for continuance were grounded upon appellant's right to counsel of his own choice coupled with Mr. Rauh's alleged inability to appear as scheduled, it was apparent from Mr. Rauh's own admission that there was no impediment to his appearing to defend appellant on the day set. The denial of a continuance did not therefore deprive appellant of his counsel in any sense.

The Sixth Amendment has never been construed to give defense counsel absolute control of the Court's calendar, but that is precisely what appellant is asking of this Court.

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[26]One should not lose sight of the practical reasons why the matter of granting or denying continuances of trial is solely within the discretion of the Trial Court. Only the Trial Judge is familiar with the state of his calendar, with the demeanor and attitude of parties and counsel, with circumstances involving Court decorum and efficiency, and with other myriad factors which must go into the decision upon request for continuance. At the time defendant was seeking his continuances in this case, Judge McLaughlin was the only Judge present in this District, Judge Wiig having left for an extended period as a visiting Judge on the mainland. Judge McLaughlin's calendar was therefore crowded and not readily adjustable to the convenience of parties and their counsel. The trial date requested by Reynolds was already taken. Thus, it was entirely reasonable for the Judge to deny the continuance, particularly when it was affirmatively shown by the defendant that the continuance was sought only for the *personal convenience* of counsel.

B. Refusal to permit defense in propria persona.

In the opinion of the Government the most serious question presented on this appeal involves the trial Court's refusal, three days in advance of trial, to permit appellant to discharge his attorney of record and to proceed in *propria persona.* Because of the reasons hereinafter stated, and after an extensive review of the cases dealing with the right to represent one's self, it is our opinion that, in the circumstances of this case, it was error to refuse to permit the appellant to represent himself during the trial in the face of his specific and timely request to so act. Whether the right to represent one's self is a constitutional right conferred by the Sixth Amendment (see *Adams v. United States, ex rel. McCann,* 317 U.S. 269), or a statutory right conferred by 28 U.S.C. 1654 (see *Brown v. United States,* C.A. D.C. No. 14389, decided February 5, 1959), it is nonetheless a right of which a defendant may avail himself, provided that he makes his decision intelligently and with eyes open and provided also that the request is not made for the purpose of obstructing or delaying the trial. *Johnson v. Zerbst,* 304 U.S. 458; *Adams v. U.S., ex rel. McCann, supra. Wharton's Criminal Law and Procedure* states:

> It is universally held that a defendant in a criminal case who is *sui juris* and mentally competent may conduct his defense in person without the assistance of counsel. (Volume V, p. 2016, 1957 Ed.)

Although the cases cited in *Wharton* in support of this principle are State cases, the rule seems equally

well settled in the Federal Courts. See for example, *United States v. Mitchell,* 138 F. 2d 831 (C.A. 2), cert. den. 321 U.S. 794; *United States v. Foster,* 9 FRD 367 (S.D. N.Y.), convictions affirmed *sub nom. Dennis v. United States,* 341 U.S. 494; *Overholser v. De Marcos,* 149 F. 2d 23 (C.A. D.C.), cert. den. 325 U.S. 889; *United States v. Gutterman,* 147 F. 2d 540 (C.A. 2); *Duke v. United States,* 255 F. 2d 721 (C.A. 9), cert. den. 357 U.S. 920; *United States v. Cantor,* 217 F. 2d 536 (C.A. 2). It is, of course, the duty of the trial Court, in insuring that an accused receives a fair trial, to satisfy himself that a waiver of the constitutional right of assistance of counsel is made intelligently, understandingly, and in a competent manner. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst, supra,* at 464, 465. In the circumstances of this case, where the defendant was a college professor, where he had indicated through his efforts in advance of trial a desire to secure specialized counsel in addition to Mr. Miho, where he made a specific and unequivocal request of the Court three days in advance of trial to conduct his own defense since the specialized counsel he sought would not be in Honolulu in time for the trial, and where there is no indication that the request to represent himself was for the purpose of securing a delay in the proceedings or to permit the use of the obstructionist tactics at the trial,

it is our opinion that the defendant should have been permitted to represent himself at the trial.

CONCLUSION.

For the reasons set forth under Point V B of this brief concerning the trial Court's denial of appellant's request to proceed at the trial in *propria persona,* the Government, on that ground, does not oppose the appellant's request of this Court for reversal of his conviction. As to the other contentions advanced in appellant's brief, it is respectfully submitted they are without merit and the rulings of the trial Court thereon were proper.

Respectfully submitted,

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Acting Assistant Attorney General,
Internal Security Division,
LOUIS B. BLISSARD,
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SANFORD J. LANGA,
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(Appendix Follows.)

Appendix.

Appendix

EXCERPTS FROM TRUSTEESHIP AGREEMENT
61 Stat. 3301-2, 3304

Agreement approved by the Security Council of the United Nations April 2, 1947, respecting trusteeship for the former Japanese mandated islands. Approved by the President of the United States of America July 18, 1947, pursuant to authority granted by a joint resolution of the Congress of the United States of America July 18, 1947; entered into force July 18, 1947.

Trusteeship Agreement for the Former Japanese Mandated Islands

Approved at the One Hundred and Twenty-fourth Meeting of the Security Council

* * * * *

Article 1

The Territory of the Pacific Islands, consisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations, is hereby designated as a strategic area and placed under the trusteeship system established in the Charter of the United Nations. The Territory of the Pacific Islands is hereinafter referred to as the trust territory.

Article 2

The United States of America is designated as the administering authority of the trust territory.

Article 3

The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.

* * * * *

Article 5

In discharging its obligations under Article 76 (a) and Article 84, of the Charter, the administering authority shall ensure that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:

1. to establish naval, military and air bases and to erect fortifications in the trust territory;
2. to station and employ armed forces in the territory; and
3. to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for the local defense and the maintenance of law and order within the trust territory.

* * * * *

Article 13

The provisions of Articles 87 and 88 of the Charter shall be applicable to the trust territory, provided that the administering authority may determine the extent of their applicability to any areas which may from time to time be specified by it as closed for security reasons.

EXCERPTS FROM CHARTER OF THE UNITED NATIONS
59 Stat. 1048-50

Chapter XII

International Trusteeship System

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

* * * * *

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate;

b. territories which may be detached from enemy states as a result of the Second World War; and

c. territories voluntarily placed under the system by states responsible for their administration.

* * * * *

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

EXTRACT FROM THE OFFICIAL RECORDS OF THE SECURITY COUNCIL OF THE UNITED NATIONS, 124TH MEETING, 2 APRIL 1947, PAGES 668-9

The President: There is a United Kingdom proposal to re-draft article 13. It has been circulated.

Sir Alexander Cadogan (United Kingdom): I do not think I need say very much about the amendment which stands in the name of my delegation. The text has already been circulated.

In the view of my Government, article 13 is one of the most important articles of the United States draft. My Government realizes that it would be impossible to provide for any prior notification to the Security Council of any areas which may be closed for security reasons, but it hopes that some provision will be inserted for notifying the Security Council when areas are closed, giving reasons if possible. With that object, we have submitted, for the appreciation of the United States delegation, this re-draft which you will find in the paper circulated.

Mr. Austin (United States of America): Perhaps the United Kingdom representative would be entirely satisfied if the records showed that the United States contemplates that notification should be made to the Security Council whenever the proviso that is contained in article 13 comes into effect. Article 13 seems to the United States of such great importance that it could not accede to a suggested change, and the United States is very anxious to find out whether my statement, as representative of the United States, is satisfactory thus avoiding a prolonged discussion. If that

is the case, I will not go into a full discussion of the matter.

You will notice that the act of specification is an act of notification, and it is the purpose of the United States to keep the Security Council notified. Of course, the main element of the provision is to bring into operation Articles 87 and 88, which call for inspection, examination and reports. Obviously the proviso is a necessary one in the interest of security; otherwise it would not be there.

Sir Alexander Cadogan (United Kingdom): I am much indebted to the representative of the United States for the declaration which he has just made. The chief purpose of the amended text which I submitted was to ensure that the Security Council should be notified in these cases. The United States representative has said that the word "specified" in his article 13 implied an act of notification, and he further declared that his Government contemplated keeping the Security Council notified. That seems to me entirely satisfactory, and I am very grateful to the representative of the United States for the declaration which he has made.

The President: In view of the satisfaction that the United Kingdom representative has expressed at the declaration of the United States representative, I take it that no vote is required on the United Kingdom proposal in regard to article 13.

Articles 13 and 14 were unanimously adopted.

No. 16,250

United States Court of Appeals

For the Ninth Circuit

BERNARD G. HOUSE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division

BRIEF OF APPELLANT

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Subject Index

Table of Authorities Cited

Constitutions

Statutes

Texts

No. 16250

United States Court of Appeals

For the Ninth Circuit

BERNARD G. HOUSE,
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vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this case by virtue of the provisions of Title 53, Chapter 2, Alaska Compiled Laws Annotated 1949 and 48 USC 101 and 193. This Court acquired, prior to January 3, 1959—and therefore now has—jurisdiction pursuant to 28 USC 1291 which then provided[1] that the courts of appeals shall have jurisdiction of appeals from all

[1]Public Law 85-508, approved July 7, 1958, effective upon the admission of Alaska into the Union (January 3, 1959), eliminated the provisions which gave this Court jurisdiction of appeals from the District Court for the Territory of Alaska and established a United States District Court for the State of Alaska. The Act continues in effect the appellate jurisdiction of this Court, once acquired.

final decisions of the district courts of the United States, the District Court for the Territory of Alaska, etc., except where a direct review may be had to the Supreme Court; and 48 USC 1294 which designates this Court as the appropriate court for appeals from such judgments in the District Court for the District of Alaska.

STATEMENT OF THE CASE

Appellant House was indicted on November 7, 1957, at Fairbanks, Alaska, for the crime of first degree murder.[2] The grand jury charged in the indictment that on the 21st day of May, 1957 House "being of sound memory and discretion, did purposely and of deliberate and premeditated malice kill Jack Perry by shooting him with a shotgun, in violation of Section 65-4-1 of the Alaska Compiled Laws Annotated, 1949."[3] He was tried in the District Court for the District of Alaska, Fourth Judicial Division, by a jury and on May 9, 1957 was found guilty of murder in the first degree.[4] A timely motion was made for a new trial, assigning as error, *inter alia,* certain jury instructions and the failure of the trial court to give certain other instructions requested by the defendant

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[2]Tr. 1.

[3]Sec. 65-4-1. *First degree murder.* That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall be sentenced to imprisonment at hard labor for life or for any term of years." As amended March 30, 1957.

[4]Tr. 26, 494.

(appellant herein).[5] Timely objection had been made previously with respect to the giving and refusal, respectively, of such instructions.[6] The motion for a new trial was fully briefed and argued[7] and on June 7, 1958 was denied.[8] On June 7, 1958, there was entered a judgment and commitment in this case, whereby the appellant was sentenced to imprisonment for a period for and during the term of his natural life.[9] On the same day he filed his notice of appeal to this Court.[10] On September 1, 1959, this Court granted leave to appellant to dispense with the printing of the record on appeal in this case and to proceed on typewritten record for review.[11] The typewritten record consisting of three volumes and containing 495 pages was filed on November 30, 1959. This brief is filed on behalf of the appellant pursuant to enlargement of time heretofore granted by this Honorable Court.

STATEMENT OF THE FACTS

The scene of the human drama with which this case is concerned is Fairbanks, Alaska, a mushrooming settlement of approximately 25,000 (including surrounding areas), still partly a pioneering, rugged mining center and partly a defense boomtown. Here one

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[5]Tr. 67-69.

[6]Tr. 25, 481-494. Defendant's requested instructions are set forth at pp. 28-34 of the transcript.

[7]Tr. 70, 77.

[8]Tr. 78-79.

[9]Tr. 81.

[10]Tr. 80.

[11]Tr. 100.

finds numerous log cabins spotted among more pretentious homes. Goldmining is actively carried on and oil fields are being developed to the North.[12] Ringing the city are two large military establishments, Eielson Air Force Base and Ladd Air Force Base, from whose confines emerge, weekly, large numbers of lonely, diversion-bent servicemen, seeking to escape the bleakness and barrenness of their surroundings and daily routine, in the many honky-tonks on the outskirts of the city, where sawdust floor covering, "B-girl" hostesses (and worse) and more or less open gambling are quite prevalent, despite occasional attempts by military and civilian law enforcement agencies to "clean up" the town.

The time is the late arriving arctic spring season, which follows the long awaited "break-up" of the ice on the nearby Tanana and Chena Rivers, the former itself being the occasion for a time honored—if quite illegal—Alaskan custom of widespread popular participation in a gambling event, the so-called Nenana "ice classic." The fever of this quasi-public lottery affects young and old, drifters and stable residents; its tickets are on sale at every drugstore, sporting goods shop and what have you and news of its progress dominates the newspaper headlines as surely as the World Series or summit conferences. It is at breakup time, that bustling, lusty Fairbanks explodes from the bondage in which darkness and arctic chills have held it enthralled for many months:

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[12]See Guide to Alaska and the Yukon (6th edition), pp. 121-125 (published by Guide to Alaska Co. of Juneau, Alaska).

"Perhaps nowhere else in the whole * * * of Alaska is the contrast between summer and winter so marked as in this bustling city (of Fairbanks), 120 miles South of the Arctic Circle. During the long summer days, when the temperature frequently rises to 90 degrees in the shade and the nights are brief intervals of twilight between sunset and dawn, a kind of fever seizes the citizens of Fairbanks. With only 100 days to wrest gold from placer or drift, to raise cabbages, potatoes and hay in the fields, and tomatoes and green vegetables in the greenhouses, to make new strikes or to develop old ones, to supply the vast expanse of the interior with transportation, household goods, mining equipment, and technical direction, everybody works most of the daylight hours. * * *

"As winter comes on and the nights grow longer, the air becomes breathlessly still and the thermometer drops to the bottom of the tube. The light snow remains poised on telephone lines and bare branches of trees in motionless bands inches high, unshaken by a breath of wind. Deep tracks are worn to woodpiles outside the door, the stove glows red in the early afternoon twilight, and under the lamp grown men pour over treatises on mining and agriculture to make a passing mark in their courses at the University of Alaska. * * * Kerosene freezes thick and white, and dogs learn to turn aside when patted to avoid the tingle of a spark of static electricity jumping from the human hand to their noses. Mail, freight, and passengers still come in over the Alaska Railroad, planes arrive daily, but the sharp, cold quiet deadens all things, throws the mind in upon itself —until there comes a rush of water in the Chena,

when the ice breaks, and a rush of blood to the head, and spring begins."[13]

The incident involves a frontier style shooting in one of the many rough, crudely furnished bars which dot the Alaska and Richardson Highways[14] leading to and from the city and which feature raw whiskey, "taxi-dance" hostesses,[15] a bit of private (and sometimes not so private) gambling[16] and the rugged companionship of men accustomed to working and drinking hard. At the time of the occurrence, this bar—somewhat pretentiously called the "Esquire Club"[17]—was run jointly by a man named Jack Perry and a woman known as Eva Beree.[17a] The day was May 21, 1957 and the time the early morning hours of the day,[18] but well after the sub-arctic sunup. Here we find Perry tending bar;[19] his "partner" Eva Beree and some of the "hostesses" sitting in booths or circulating among the assembled sundry construction workers, cab drivers and "G.I.'s".[20] One of the female employees has fallen asleep or passed out in a booth and a somewhat heated exchange is taking place between Perry and his female partner as to who is to

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[13]Colby, A Guide to Alaska, Last American Frontier (Pub. by the MacMillan & Company, New York, 1950), pp. 294-295.

[14]Tr. 117, 186.

[15]Tr. 134-135, 456.

[16]Tr. 454, 477.

[17]Tr. 117, 186.

[17a]Tr. 132, 452, 456.

[18]Tr. 129a.

[19]Tr. 134, 187, 390.

[20]Tr. 133-134, 292, 306, 308, 366, 388-389.

take her home.[21] It seems that Perry desires to do so and has taken a loaded automatic pistol from a drawer, which he wishes his helpmate to keep on the alert, while he is departing.[22] Apparently, however, it was decided that Miss Beree is to take the young woman home and so Perry, presumably somewhat miffed and considerably in his cups, returns behind the bar, still carrying the lethal weapon.[23]

While this is going on, two men have been amusing themselves at the bar, one, who is seated, is Dean Scott, also a bar owner[24]—away from his estabment on a "busman's" holiday—the other, Bernard G. House, known around Fairbanks as Johnny House, a construction worker (painter),[25] who is the defendant and appellant in this case, standing up. The two are friends and, as a matter of fact, it was the coincidence of House having spotted Scott's parked car in front of the establishment, while House was returning from hunting birds[26] with a companion (also present, but since deceased prior to trial in a rescue attempt).[27] There is a loaded shotgun lying on the floor of House's parked stationwagon, borrowed from a friend for the purpose of the hunt.[28]

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[21]Tr. 133-134, 195-196, 458-459.
[22]Tr.132, 391-392, 458.
[23]Tr. 133, 135, 416.
[24]Tr. 281.
[25]Tr. 402, 413.
[26]Tr. 415-416, 431.
[27]Tr. 273, 338, 390, 415.
[28]Tr. 443.

Scott had come to the place to discuss its possible purchase with Perry, who apparently desired to leave, for reasons of his own.[29] When House arrived, he and Scott made use of the availability of the ever present cup of dice, handy at the bar, first to "shake for drinks" and soon to gamble for money.[30] It seems this was Johnny House's unlucky night, because soon he had lost all the cash he carried and, apparently becoming quite interested in the contest, he leaves by cab to get some more money from his nearby home and to return to resume the game.[31] While the game continues, several men are either watching or engrossed in their own business, some nearby at the bar drinking,[32] some sitting in the adjoining booths or conversing or dancing with the hostesses.[33]

One little group of airmen from a nearby base, having arrived during the wee hours of the morning,[34] after an extended tour of other drinking establishments,[35] is congregating at the far end of the bar.[36] It may be reasonably assumed that there is a fair din being produced, by the tinkle of the jukebox,[37] the various discussions between Perry, the bartender, and his female companion and employees, the rugged conversations of the drinking patrons, and the shouts of

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[29]Tr. 282.
[30]Tr. 118-119, 187, 283, 310, 339, 417.
[31]Tr. 283-284, 310, 339, 367, 418.
[32]Tr. 119, 188.
[33]Tr. 146, 285, 313, 340.
[34]Tr. 117-118, 129a, 367.
[35]Tr. 129a-132, 163, 193-194.
[36]Tr. 118, 368.
[37]Tr. 155, 285, 313, 340.

pleasure or dismay, as the case may be, of the men throwing dice for money.[38]

No one will ever know for certain what prompted Jack Perry—a man of unstable and violent disposition[39]—at that moment to get into an argument with Scott and House and particularly the latter. Witnesses for the government insist that it was Perry's objection to the gambling and profanity of the players,[40] although they fail to explain why Perry took umbrage at so late a stage in the proceedings, except perhaps that he wished to close down the place.[41] Defense witnesses maintain just as stoutly that the argument arose when Perry, who had on several previous occasions taken the "cut of the house"—a customary semi-voluntary contribution—from the stack of money lying at the bar, helped himself once too often.[42] There is also a hint of a possibility that, already stirred up by alcoholic indignation, he mistook the appellant for someone against whom he had a grudge.[43] In any event, all witnesses agree that in the course of the verbal altercation which followed, Perry brandished his loaded weapon, waved it about and pointed it directly at the appellant House.[44] There is testimony that he pulled the trigger once and when the weapon failed to fire, he re-cocked it, injecting a shell into its

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[38]Tr. 135, 341.
[39]Tr. 357-358.
[40]Tr. 119, 139.
[41]Tr. 146, 459, 477.
[42]Tr. 284-285, 314, 368-369, 376, 393, 419.
[43]Tr. 314, 402.
[44]Tr. 119, 138, 188, 198, 286-287, 341, 369, 392-393, 465.

chamber and thereafter continued to point it threateningly at House.[45] While so doing, he first insisted that House sit down and shortly thereafter, that he leave the place.[46] It is fairly uncontroverted, moreover, that he refused House the privilege of picking up the sizable stack of the latter's money then reposing on top of the bar, but forced him to retreat through the entrance door which was promptly bolted.[47]

Both of the two hostile groups of witnesses likewise agree, that almost immediately thereafter House returned, pounding or kicking at the door for admittance[48] and that someone slipped the bolt, causing the door to fly open and House to stride in, carrying his shotgun.[49] The appellant says that he was gone only long enough to walk quickly to his parked car and pick up the shotgun, with the idea uppermost in his mind that he must reclaim his money and if possible, disarm Perry, whom he considered a dangerous madman;[50] that he pushed against the door which was locked and which promptly flew open,[51] that he took a few steps which brought him up against the front of the bar and that there, by the beer cooler,[52] stood Perry, levelling his .45 caliber automatic at House,[53]

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[45]Tr. 287, 314-315, 369, 409, 421, 475-476.

[46]Tr. 119, 136-138, 287, 343, 420.

[47]Tr. 119, 139-140, 288, 303-304, 315, 421.

[48]Tr. 119, 289, 316, 334-335, 374, 393, 399-400, 402, 465.

[49]Tr. 120, 299, 316, 324, 373, 377, 436.

[50]Tr. 422-423, 433-434.

[51]Tr. 422, 434.

[52]Tr. 189, 288, 399.

[53]Tr. 289, 298, 317, 325, 344, 370, 381, 394, 399, 408, 423, 435, 437.

who brought up his gun and fired, hiting Perry in the side as he twisted away, whereupon the bartender fell down and his pistol fell and slid across the floor.[54] The appellant says that in the sudden shock of what had happened, he placed his shotgun on the counter and, clapping his hands to his face, exclaimed "Oh my God, what have I done". He states that he then admonished the crowd, which was in an understandable uproar, to stay put and leave everything unchanged,[55] as he was going to notify the police, which he proceeded to do, by driving to the nearest place with a telephone, another bar, whose owner corroborates appellant's claim that he called law enforcement officers. Appellant then returned to the scene of the shooting.[56]

The version of the government's witnesses differs sharply in some important respects from that of the defense witnesses, as related above. Thus it is claimed that Perry put the automatic pistol into the pocket of his coat after his initial assault upon House and that he never took it out of there, even up to the point where he fell, fatally wounded, to the floor;[57] it is not clearly explained, however, how it found its way out of his pocket to where it was later discovered, cocked and loaded.[58] It is also alleged by the prosecution witnesses, that House cursed and menaced Perry as he retreated towards the door under the threat of Perry's

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[54]Tr. 290, 299, 317, 319, 351-352, 424, 435.
[55]Tr. 290-291, 317, 318, 344, 394, 400, 424.
[56]Tr. 318, 382-385, 394, 400, 424-426.
[57]Tr. 120-121.
[58]Tr. 158-159, 220-221, 229, 232, 239, 302, 476.

weapon;[59] that after the shooting some members of the crowd grabbed the shotgun and placed it on the bar;[60] and an attempt is made to cast some doubt upon House's claim that he notified police and then returned to the scene of the homicide.[61]

All the witnesses agree, however, on some of the most important elements of this unfortunate sequence of events. They are in substantial agreement about the fact of the initial assault by Perry upon House, with a deadly weapon, although they may differ as to what kind of verbal argument initially led to it. They agree that House retreated reluctantly, only to return momentarily, after having armed himself.[62] It is virtually uncontradicted that Perry would not permit House to take his stack of money off the bar, after he had been chased out under the threat of Perry's gun; and that Perry then sought to lock him out of the place and that upon House's knocking to demand admission, somebody let him in. The witnesses concur that the shooting followed almost instantaneously after House's re-entry into the bar;[63] that it caught Perry in the side as he twisted[64] and that Perry's cocked and loaded gun was later found lying on the floor;[65] while House's shotgun was found placed on the counter of the bar.[66] They are fairly unanimous

[59]Tr. 119, 188.
[60]Tr. 123, 165, 409.
[61]Tr. 122, 128-130.
[62]Tr. 110-120, 140, 188, 204, 343.
[63]Tr. 120, 188, 289-290, 324, 370, 375, 393, 399.
[64]Tr. 157-158, 319, 344, 376, 394.
[65]Tr. 158-159, 220-221, 229, 290.
[66]Tr. 219, 230, 233.

with respect to House's immediate outcry of dismay and remorse[67] and the fact that someone must have gone out to call the police and then returned and they can point to no one who did,[68] other than the appellant House.[69]

Thus the crucial issues of fact, upon which the fate of the defendant hung in balance and which the jury was called upon to resolve were these:

1. When House retreated, armed himself and returned, demanding admission, did he then and there decide to return and murder Perry or did he return for the lawful purpose of reclaiming his property and disarming the man who had just committed a felonious assault upon him?

2. After House re-entered the bar, carrying his shotgun, did Perry again assault him with his loaded pistol, thus causing House to fire in self-defense or did House cut down Perry as he fled, seeking cover?

The appellant, in the argument to follow, will seek to show that as to both of these vital issues, with respect to which the jury was charged with the awful duty of ultimate determination of the truth, the jury's minds and powers of deliberation and decision with respect to issues of fact, clearly and entirely within their province, was erroneously and prejudicially fettered and restrained, by instructions given by the trial court, over timely objection. These objectionable instructions contained within them a peremptory reso-

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[67]Tr. 123, 190.
[68]Tr. 129, 190.
[69]Tr. 292, 297.

lution, adverse to the defendant, of both of these all-important issues; and hence they amounted to a judicial mandate to find the defendant guilty of murder. Thus the verdict of the jury, far from constituting the product of free and unhindered deliberation, in a fair and open trial, became an inevitable result and a foregone conclusion, in derogation of the defendant's constitutional rights.

SPECIFICATION OF ERRORS

1. The trial court erred in giving jury instruction No. 12, and particularly that portion which reads " * * if you are convinced by the evidence beyond a reasonable doubt that the defendant re-entered the Esquire Club with the intention of shooting the deceased, you cannot find (sic) that he shot in self-defense. * * *", in that the quoted language misled and unduly restricted the jury on the all-important issue of intent.*

*2. The trial court erred in giving instruction No. 12, and particularly that portion thereof which reads "The assault with a dangerous weapon made upon the defendant by the deceased before the defendant left the Esquire Club had ended * * *", in that the quoted language misled and unduly restricted the jury on the all-important issue of self-defense.*

3. The trial court committed plain error in giving Instruction No. 5, containing language which obliterated the important distinction between a deliberate, premeditated murder and an impulsive killing.

4. The trial court, in giving Instruction No. 15, further confused and misled the jury on the vital element of intent.

5. The trial court erred in refusing to give defendant's requested Instructions Nos. 3, 4, 5, 6, 11, and 12.

6. The trial court abused its discretion in failing to grant a new trial after being fully apprised of the foregoing errors in its jury instructions.

7. By unduly restricting the exercise of the jury's fact finding functions on the all-important issues of intent and self-defense, the trial court deprived the accused of his constitutional rights under Article 3 of the United States Constitution and the Fifth and Sixth Amendments thereto.

ARGUMENT

I. IN INSTRUCTING THE JURY THAT, IF IT SHOULD BE CONVINCED THAT THE DEFENDANT RE-ENTERED THE PREMISES WITH THE INTENTION OF SHOOTING THE DECEASED, IT "CANNOT FIND THAT HE SHOT IN SELF-DEFENSE", THE TRIAL COURT IMPROPERLY INVADED THE PROVINCE OF THE JURY AND PREJUDICIALLY FORECLOSED A FINDING OF FACT, FAVORABLE TO THE DEFENDANT, TO THE EFFECT THAT HE DID ACT IN SELF-DEFENSE, WHEN, UPON RE-ENTERING THE PREMISES, HE WAS FACED WITH A NEW ASSAULT WITH A DEADLY WEAPON WHICH THREATENED HIS LIFE. THE QUOTED LANGUAGE FURTHER MISLED THE JURY IN THAT, BY IMPLICATION, IT PRECLUDED AND PREVENTED A FINDING OF FACT, FAVORABLE TO DEFENDANT, TO THE EFFECT THAT WHILE HE RETURNED TO THE PREMISES WITH THE INTENTION OF SHOOTING THE DECEASED, SUCH INTENTION WAS BASED UPON THE EXPECTATION AND APPREHENSION THAT THE DECEASED WOULD RENEW HIS FELONIOUS ASSAULT UPON THE DEFENDANT, THEREBY ENDANGERING HIS LIFE, AND THAT THE SHOOTING WOULD THEREFORE BE NECESSARY IN SELF-DEFENSE.

In a criminal case, the court's instructions should cover every issue or theory having any support in the evidence.

Stevenson v. United States (1896), 162 U.S. 313, 16 S.Ct. 839, 40 L.ed. 980

Where there is any evidence tending, in an appreciable degree, to support a particular theory of a case, the court may give to the jury instructions presenting it to them and the defendant is entitled to have charges given, if there is any evidence as a foundation therefor and regardless of the weakness, insufficiency, inconsistency or doubtful credibility of the proof, and so long as the testimony is not unreasonable or stamped with improbability, he is entitled to have the theory which it embodies presented to the jury with appro-

priate instructions. All doubts in this respect, must be resolved in favor of the defendant.

State v. Grugin (Mo., 1898), 47 S.W.1058, 42 LRA 774, 71 Am.St.Rep. 553

State v. Legg (W.Va.1906), 53 S.E.545, 549, 3 LRA(NS) 1152

Specifically, where there is evidence tending to indicate that the defendant may have acted in self-defense or in the defense of another in taking the life of the deceased, it is the duty of the trial court to instruct the jury adequately on the law of self-defense as it is applicable to the facts of the case. Such instructions must leave the question to be determined by the jury in the light of *all the facts and circumstances* in the case, rather than in the light of certain particular facts, whether relied on by the prosecution or by the accused, and must be an accurate and reasonably clear statement of the law of self-defense. The correctness of the instructions given is determined by the rules of law governing the right of self-defense as applied to the situation developed by the evidence.

Allison v. United States (1895), 160 U.S. 203, 16 S.Ct.252, 40 L.ed.395

Perovich v. United States (1907), 205 U.S.86, 27 S.Ct.456, 51 L.ed.722

Rowe v. United States (1896), 164 U.S.546, 17 S.Ct.172, 41 L.ed.547

State v. Cushing (Wash.,1896), 45 P.145, 53 Am.St.Rep.883

and *cf., Bird v. United States* (1902), 187 U.S. 118, 23 S.Ct.42, 47 L.ed.100

It has been held that where it applies, the right to stand one's ground should form an element of the in-

structions upon the necessity of a killing, and upon the law of self-defense.

People v. Hecker (Cal.,1895), 42 P.307, 313, 30 LRA 403

The rule which appears to prevail in the United States—and most assuredly applies in Alaska—is that where from the nature of the attack, an assailed person believes, on reasonable grounds, that he is in imminent danger of losing his life or of receiving great bodily harm from his assailant, he is not bound to retreat, but may stand his ground, and, if necessary for his own protecton, may arm himself and may take the life of his adversary.

Brown v. United States (1921), 256 U.S.335, 41 S.Ct.501, 65 L.ed.961

DeGroot v. United States (CCA 9th,1935), 78 F.2d 244, 5 Alaska Fed.785

Frank v. United States (CCA 9th,1930), 42 F 2d 623, 5 Alaska Fed.523

In the case of *Thompson v. United States* (1894), 155 U.S. 271, 15 S.Ct. 73, 39 L.ed. 146, the trial court had instructed the jury that if the accused thought that grave danger would come upon him by choosing a certain course of action and that if he was even temporarily away from it, he could avoid it, then it was his duty so to stay away from it and avoid it, the Supreme Court of the United States, in disapproving the instruction, said:

> "These instructions could, and naturally would, be understood by the jury as directing them that the accused lost the right of self-defense by returning home by the road that passed by the

> place where the deceased was, and that they should find that the fact that he had armed himself and returned by that road was evidence from which they should infer that he had gone off and armed himself and returned for the purpose of provoking a difficulty. Certainly the mere fact that the accused used the same road in returning that he had used in going from home would not warrant the inference that his return was with the purpose of provoking an affray, particularly as there was evidence that this road was the proper and convenient one. Nor did the fact that the defendant, in view of the threats that had been made against him, armed himself, justify the jury in inferring that this was with the purpose of attacking the deceased, and not of defending himself, especially in the view of the testimony that the purpose of the defendant in arming himself was for self-defense."
>
> *loc. cit.,* at p. 276

The present case is stronger than those cited above, because here the defendant not only sought to return to a place where he had a right to be, free from threats and molestation, but rather, he returned to a public place where he had just been feloniously assaulted and deprived of his property by force and arms; and thus he had the twofold privilege—as well as duty—to return and reclaim his property and, if possible, to disarm and arrest his assailant.[70]

> See defendant's proposed instructions Nos. 11 and 12 and statutes and cases cited in support thereof (Tr. 33-34).[71]

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[70]See: 66-5-37, ACLA 1949.

[71]These instructions were refused.

The evidence seems uncontradicted that the defendant, after having been feloniously assaulted with a deadly weapon by the deceased, retreated through the door, and—almost immediately thereafter—returned, having armed himself with a shotgun taken from his car, which was parked right outside of the door. In relating this specific portion of the incident, the defendant (appellant) testified as follows:

> "A. I backed away from the bar, (Perry) worked the slide (of the automatic pistol), and he said, 'now, get out of my bar,' I said, 'well, hey, I've got some money laying here on the bar.' I said, 'how about letting me pick my money up?' He said, 'don't pick up nothing. Just get out of my place.' So I said, 'well I want my money'. He said, 'get out of here.' Well, I was in no position to argue. I turned and left and walked out the front door * * * and my car was parked at an angle right outside that front door, in other words, where the entrance come(s) out, my car door would be * * * right at an angle, parked there * * *. I thought this guy must undoubtedly be nuts to approach a person like me that he doesn't know and try to shoot me and threaten me and take my money, so I started to get in the car, when I got in the car I saw the gun, the gun was lying on the back seat. I said, 'Well, Dean, Jack and all the men I know were back there. I am going to go back in there and if possible disarm him.' I grabbed the shotgun * * * and took it out of the back seat of the car and walked back up to the front door * * *. The door was locked. I kicked on the door with the toe of my shoe. * * * I heard somebody yell. When they yelled, the door opened—I could hear the bolt

slide on the door. The door opened. I carried the gun in at what I call trail arms. When I was in the service, you carry it down, trail arms. When I walked through the door, Mr. Perry was standing behind the bar with the gun pointing right at me. The first thing my natural reaction was, I reached up and just took the gun like this (indicating) and pulled the trigger. I didn't intend to kill the man. I had never killed anybody in my life before and I didn't intend to kill him. I have never had any intention to kill anybody."

"Q. What was your intention, Johnny House, when you walked through that front door?"

"A. I figured the man, as drunk as he was, would more than likely after I left there, the man would either lay the pistol down or put it back in his pocket or something and I intended to disarm him if he had the gun on him and at least turn him over to the law or at least turn him over to somebody, because the man undoubtedly couldn't have been in his right mind to do what he did. * * *"

Tr. 421-423

Under the authority of the cases cited above, and as a matter of common sense, it is obvious that the defendant had a right to have his theory of the case presented to the jury, as an alternative to that contended for by the prosecution. Thus, the jury should have been given the opportunity to find that, although the defendant may have picked up the shotgun and returned with the intention of shooting Perry, this intention was conditioned upon the revival or renewal of the attack upon defendant's life; that the

defendant did not intend to fire his gun, unless he were again attacked; but that, most assuredly, he was prepared to fire it, to defend his life.

Yet, under the instruction given, to the effect that

> "If you are convinced by the evidence beyond a reasonable doubt that defendant re-entered the Esquire Club with the intention of shooting the deceased, *you cannot find* that he shot in 'self-defense'. * * *" (Italics supplied)
>
> Tr. 49

the jury was compelled to conclude that if the defendant had *any* intention whatever of shooting, when he returned to the club, no matter how qualified or conditioned, it could not be considered self-defense. Obviously, most anywhere in the world, and most assuredly in Fairbanks, Alaska, when a man arms himself with a shotgun before an encounter with an armed adversary, he does so with the intention of shooting. Shooting, perhaps, only if necessary, but shooting, nevertheless. Thus, by the instruction given, the jury was compelled to reject the defendant's theory of self-defense and to reject the defendant's theory of lawful intent at the time of his reentry upon the premises.

As was stated by the court in the case of *Konda v. United States* (CCA 7th, 1908), 166 F. 91, 22 LRA (NS) 304:

> "* * * a defendant in a criminal case has the absolute right to require that the jury decide whether or not the evidence sustains each and every material allegation of the indictment. Ma-

terial allegations are allegations of fact. And each, as much as any other, enters into a verdict of guilty. If the judge may decide that one or another material allegation is proven, he may decide that all are proven, and so direct a verdict of guilty. * * * since the judge is without power to review and overturn a verdict of not guilty, there is no basis on which to claim the power to direct a verdict of guilty. * * * an accused person has the same right to have (the jury) pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting."

loc. cit., at p. 93

Here, the language of the court objected to by appellant, amounted, in effect, to a mandatory instruction to find against the defendant on the issue of self-defense and to find him guilty of at least some degree of culpable homicide, so long as the jury believed that he armed himself with the intent of shooting, whatever the circumstances which he might encounter upon his return. This instruction clearly invaded the province of the jury and deprived the defendant of his right to have a material, indeed a vital, allegation of the indictment—that pertaining to his intent and deliberate premeditation and malice—determined by the jury, instead of by the court. For this reason alone, he should be granted a new trial.

II. IN INSTRUCTING THE JURY PEREMPTORILY THAT THE ASSAULT WITH A DANGEROUS WEAPON MADE UPON THE DEFENDANT BY THE DECEASED "HAD ENDED", THE TRIAL COURT ERRONEOUSLY INVADED THE PROVINCE OF THE JURY AND PREJUDICIALLY PRECLUDED A FINDING, FAVORABLE TO THE DEFENDANT, THAT SUCH ASSAULT WAS CONTINUED, OR REVIVED, WHEN THE DEFENDANT RE-ENTERED THE PREMISES, THUS FORCING HIM TO SHOOT IN SELF-DEFENSE.

Instruction No. 12, discussed in the preceding paragraph, also contains the following ambiguous language which was brought to the attention of the trial court,[72] namely, "the assault with a dangerous weapon made upon the defendant by the deceased before the defendant left the Esquire Club had ended, * * *".

This part of the instruction even more directly than the one discussed in the preceding paragraph, involves an outright finding of fact and peremptory direction by the court to the jury, invading the latter's province, in that it precluded a finding that the felonious assault upon the appellant continued or was revived upon his re-entering of the premises. This portion of the instruction, when coupled with the one discussed previously, must have absolutely and finally defeated any chance the appellant might ever have had of persuading the jury that he acted in self-defense, because under the instructions of the court the jury was compelled to find that: (1) when the defendant returned to the Esquire Club his life was not subject to imminent danger from an assault with a deadly weapon by the deceased and (2) if, when re-entering carrying his shotgun, the defendant intended to use it, there could have been no self-defense. Since

[72]Tr. 481.

even under the defendant's version of the facts it was conceded that he re-entered the premises, armed, for the purpose of reclaiming his property and disarming his assailant; since it may be reasonably implied that when he took the shotgun he did so for the purpose of using it, if necessary, and since defendant's entire case was based upon his assertion of his right to self-defense against the second or renewed felonious assault upon him, this instruction came as close to a directed guilty verdict as it could, without actually using the words "under the facts of this case you cannot find that the defendant acted in self-defense and you must, therefore, find him guilty of some degree of homicide." Moreover, when coupled with instruction No. 15, also objected to—which is discussed in the next succeeding paragraph—the net effect of the total instructions was to direct the jury to find a verdict of "guilty of first degree murder".

In giving instructions to the jury in a homicide prosecution as in instructing the jury in any other criminal case, it is fundamental that the trial court may not invade the province of the jury or usurp its functions to find the facts of the case; it should not give instructions calculated to influence the jury in its decision as to the facts, or give an instruction which assumes as true the existence or non-existence of any material fact in issue, with respect to which there is some evidence or want of evidence in conflict.

Sec. 63-13-2, ACLA 1949

Dolan v. United States, (CCA 9th, 1903), 123 F.52, 2 Alaska Fed.105

Simpson v. United States, (CCA 9th, 1923), 289F. 188, 5 Alaska Fed.146, cert. den.263 US 707, 44 S.Ct. 35, 68 L.Ed.517, 5 Alaska Fed. 146

Frank v. United States, (*supra*)

Fosse v. United States, (CCA 9th, 1930), 44 F. 2d 915, 5 Alaska Fed.580

Freihage v. United States, (CCA 9th, 1932), 56 F.2d 127, 5 Alaska Fed.618

And see also: *Quercia v. United States,* (1933), 289 US 466, 53 S.Ct.698, 77 L.ed.1321

Thus it appears that in two different elements of the same objectionable instruction, each having a cumulative effect upon the other, the trial court in the present case invaded the province of the jury and deprived the defendant, on trial for murder, of his right to a determination of the material issues of the case, by a jury free from the fetters of judicially imposed restraints upon their deliberations.

In *Jones v. United States,* (CA 9th,1949), 175 F.2d 544, 12 Alaska 405, this Court pointed out the importance of assuring to a defendant in a murder trial a fair opportunity of having the issue of his guilt or innocence determined by the unfettered deliberations of a jury, no matter how shocking the crime or how strong the indications of the appellant's guilt. The principles there enunciated are even more strongly applicable where, as in the present case, both the question of guilt and that of the degree of such guilt, if any, depend upon the resolution of sharply conflicting testimony and the drawing of inferences with respect

to intent and the defendant's state of mind, based upon circumstantial evidence.

III. IN INSTRUCTING THE JURY THAT, IN FINDING THE DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE, IT WAS NOT REQUIRED THAT THERE HAVE ELAPSED ANY PRESCRIBED OR STANDARDIZED AMOUNT OF TIME BETWEEN THE FORMATION OF THE INTENT TO KILL AND THE ACT OF KILLING, BUT THAT "A DECISION MAY BE ARRIVED AT IN A SHORT PERIOD OF TIME", THE COURT OBLITERATED THE EFFECTIVE DISTINCTION BETWEEN MURDER IN THE FIRST DEGREE AND MURDER IN THE SECOND DEGREE AND THEREBY CONFUSED AND MISLED THE JURY. THIS CONSTITUTES PLAIN ERROR.

This is the precise point so strongly emphasized by this Court in *Jones v. United States,* (*supra*). Although the instruction in the present case does not contain all of the offensive language condemned in the *Jones* case *supra,* yet its net effect is to give the impression to the jury that even if they believe those witnesses and the defendant, who testified that the decision to shoot was not formed until after the accused had returned to the premises and was confronted by the deceased's weapon pointed at him, the thoughts which flashed through the defendant's mind during this split second were sufficient to constitute "premeditation" for the purpose of finding him guilty of first degree murder. Thus, under the particular facts of the present case, the somewhat less extreme instruction here used was bound to have the same prejudicial effect as did the more specific instruction under the circumstances which prevailed in the *Jones* case.

Although this point was not specifically objected to, it was brought to the trial court's attention as part of the motion for a new trial,[73] and in any event would be noticed by this Court under the "plain error" rule.

Jones v. United States, (*supra*).

IV. IN GIVING INSTRUCTION NO. 15, OVER OBJECTION, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN CONFUSING AND MISLEADING THE JURY ON THE VITAL ELEMENT OF INTENT.

Instruction No. 15, given over objection,[74] was taken *verbatim* from the proposed instructions submitted by the prosecution. It read as follows:

> "Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.
>
> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one stand-

[73]Tr. 67.

[74]Tr. 492; (see also Tr. 68).

ing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

"In determining the issues as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind."

The language just quoted seems clearly subject to two important vices: first, it does not accurately state the law, as will be shown more specifically below and, secondly, this instruction should not have been given at all, under the circumstances of the case, even assuming that it were in proper form.

It should first be noted that the trial court had earlier defined all of the elements of first and second degree murder in terms of "intent" or "intention". In instruction No. 4, the trial court stated that the word "purposely" means "intentionally"; premeditation was defined therein as conceiving a plan or method by which the defendant might undertake to achieve the "intended" result, malice was defined as the "intentional" doing of a wrongful act.[75] In Instruction No. 5 the court stated that "the intent to kill must be the result of deliberation", thus relating the element of deliberation to the question of "intent."[76]

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[75]Tr. 44-45.

[76]Tr. 45.

As to second degree murder, in instruction No. 8 the trial court indicated that the two elements of the crime were that the killing be done "purposely" and with "malice",[77] both of which elements had already been equated by the trial court with the concept of "intent" *(vide supra)*. In instruction No. 12, the trial court introduced yet another concept of "intent", namely, the "intention" with which the defendant re-entered the Esquire Club at the time of the shooting.[78]

Where criminal intent is an essential element of the crime, it must be proven like any other fact. In such cases, the law does not permit the judicial creation, by instruction or otherwise, of any presumptions or inferences which may be permitted to take the place of evidence. Appellant contends that the effect upon the minds of the jury, of the language used by the court in instruction No. 15, was to create a presumption, not warranted or supported by the facts of the case. This is because, in effect, taken with the other instructions just referred to, instruction No. 15 permitted the jury to presume or infer the existence of criminal intent, malice, premeditation, and deliberation, from the mere act of firing the gun at the deceased Perry, or from the mere act of re-entering the Esquire Club, while armed with a shotgun.

As authority for its proposed instruction, subsequenty accepted by the court, the government cited the case of *Morissette v. United States* (1952), 342 US

[77]Tr. 46-47.
[78]Tr. 49.

246, 72 S.Ct.240, 96 L.ed.288. Yet in that case the Supreme Court said:

> "It follows that the trial court may not withdraw or prejudge the issue (of intent) by instructing that the law raises a presumption of intent from such an act. * * * We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary."
>
> *loc. cit.,* at pp. 274-275

In the present case, both the defendant and a number of eye-witnesses had testified to all the facts surrounding the shooting. Under these circumstances, the instruction here objected to must have tended to force the jury to close its mind to this testimony and to draw inferences or make presumptions contrary to specific evidence bearing upon the issue of intent.

In *Vallas v. State* (Neb. 1939), 288 N.W. 818, the trial court gave the following instruction:

> "The law warrants the presumption, or inference, that a person intends the results or consequences to follow an act which he intentionally commits, which ordinarily do follow such acts."

This instruction was disapproved by the appellate court, which said:

> "Where the defendant is charged with assault with intent to kill or wound, and the details of the shooting and the attendant circumstances in reference thereto are testified to by eye-witnesses, instructions with reference to the presumption of law and intent should not be given, and, if given, constitute prejudicial error. The presumption of law does not take the place of such evidence or lessen or shift the burden of proof. In cases of this kind, intent is one of the principal elements of the offense charged, and instructions on the burden of proof in this respect are proper; likewise instructions, informing the jury as to matters to be taken into consideration in determining the intent * * *, would be proper, but instructions that overstate or overemphasize the intent, as heretofore explained, in view of the testimony of eye-witnesses to the shooting and to the attendant circumstances, are erroneous and prejudicial, as a matter of law."
>
> *loc. cit.,* at p. 820

And see also:

State v. Wilson (Iowa, 1943), 11 N.W.2d 737, 754 and

Smith v. State (Miss., 1931), 137 So.96, 98

Again, in the case of *State v. Creighton,* (Mo., 1932), 52 S.W.2d 556, yet another court of last resort had this to say:

"Complaint is made of instruction No. 10, which said that one who intentionally uses upon another at some vital part a deadly weapon must be presumed to intend death, etc. Appellant maintains this instruction was unnecessary and improper, and tended to minimize his defense of self-defense. We think this criticism is just. * * * The facts attending the homicide were detailed by eye-witnesses, and the appellant did not deny its commission or claim it was unintentional. He invoked only the defense that it was done on either just or lawful provocation, and that he killed in self-defense, all of which predicate an intent to kill or inflict bodily harm. In these circumstances, no instructions on the presumption was called for."

loc. cit., at p. 565

In the case of *Tullos v. State,* (Miss., 1954), 75 So.2d 257, the trial court gave the following instruction:

"The court instructs the jury for the State that the deliberate use of a deadly weapon in any difficulty, not in necessary self-defense, is a fact from which malice may be inferred."

On appeal, this language was disapproved by the highest court of the state, which said:

"In this case, eight eye-witnesses, including the appellant, testified to the facts. This court has consistently held that where all the facts and circumstances surrounding a killing are fully disclosed by the evidence, it is error to instruct the jury that the deliberate use of a deadly weapon is evidence of malice or that the law presumes malice from such use. * * * The facts and cir-

> cumstances surrounding the killing were fully disclosed in this case, therefore, for the error in granting the instruction complained of, the judgment of the court below must be reversed."
>
> *loc. cit.,* at p. 258

And see also:

People v. Snyder (Cal., 1939), 96 P.2d 986

In the present case, by charging the jury in instruction No. 15 that "there can be no eye-witness account of the state of mind with which the acts were done or omitted" and that "it is reasonable to infer that a person ordinarily intends the natural and probable consequences of facts knowingly done or knowingly omitted" and that "the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused", coupled with the language referred to above, in instructions Nos. 4, 5, 8 and 12, which equated "intent" with "premeditation" and thus with "malice", the trial court must have created the kind of confusion in the minds of the jury which is condemned by the cases just cited.

The instruction, moreover, was not limited to any particular crime *(e.g.,* first or second degree murder) with respect to the issue of "intent". Thus the jury was given no guide by which to apply the instruction. It must have been further confused, by the exclusion from among the items which the jury was told it could consider, of the testimony of the defendant himself.

By saying that "there can be no eye-witness account of the state of mind with which the acts were done or omitted" the jury was told in fact, that it could not consider the testimony of the defendant as to what his intent was. It must have left the jurors with the impression that they were permitted—and indeed required—to infer the existence of the criminal intent to kill—and of malice, premeditation and deliberation —from the mere act of firing the gun at the deceased, particularly in the light of the other instructions referred to above. Thus, this instruction, too, adds to the overwhelming compulsion of excluding any finding of self-defense, since it permits the jury to infer criminal intent from "an act knowingly done", although the defendant specifically admitted the shooting and plead provication and justification under the circumstances.

V. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NOS. 3, 4, 5, 6, 11, AND 12.

Defendant's proposed instruction No. 3,[79] would have permitted the jury to take into consideration the testimony of defendant and several witnesses, if believed, to the effect that defendant remained at the scene of the homicide instead of attempting to flee. Proposed instruction No. 4,[80] covered the effect of the threats made by the deceased against the defendant, his reputation for violence, as testified to by some of

[79]Tr. 29.
[80]Tr. 29-30.

the witnesses, and his provocative conduct prior to homicide, upon the issue of self-defense. Proposed instruction No. 5,[81] bears upon the defendant's state of mind, as influenced by the deceased's prior conduct, at the time of the acts which defendant claims were done in defense of his person. Proposed instruction No. 6,[82] went to the heart of the issue of self-defense, by stating the law applicable to the defendant's right to return to the premises and to the issue of whether or not, under the circumstances of this case, defendant was legally compelled to retreat or could stand his ground and defend himself even to the point of taking the deceased's life. Proposed instruction No. 11,[83] dealt with the right (and duty) of the defendant to disarm and arrest the deceased, following the latter's assault upon the defendant with a deadly weapon, another major element of the defense of self-defense. Proposed instruction No. 12,[84] dealt with the right of the defendant to defend and reclaim his property, which had been forcibly taken from him by the deceased, under threats of violence or death and his further right of self-defense where, in so defending and reclaiming his property, he is once again confronted with danger to his life.

Statutes and cases were cited to each of the proposed instructions, which were rejected by the court. It does not appear from the record that these instruc-

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[81]Tr. 30.
[82]Tr. 30-31.
[83]Tr. 33.
[84]Tr. 34.

tions, which correctly stated the law and were applicable to the facts of the case, and which dealt with material points at issue, were adequately covered, or at all, by the instructions which were eventually given by the court. The refusal to give instructions applicable to the issues which are not covered by other instructions given is a ground for reversal, where such refusal is prejudicial.

Burton v. United States (1905), 196 US 283, 25 S.Ct.243, 39 L.ed.482

Pinkerton v. United States, (CCA 5th,1944), 145 F.2d 252

Calderon v. United States, (CCA 5th,1922), 279 F. 556

Wright v. United States, (CA DC, 1957), 250 F.2d 4

Johnson v. United States, (CA DC, 1957), 244 F.2d 781

United States v. Chicago Express, Inc., (CA 7th,1956), 235 F.2d 785

As has been shown above, the instructions given in the present case were neither adequate nor correct. Refusal to grant pertinent instructions requested by the defense thus compounded the prejudicial effect of the charge and, in a case charging a crime of the highest order of magnitude, it should be more than ample grounds for a new trial.

VI. HAVING BEEN FULLY APPRISED OF THE ERROR CONTAINED IN ITS INSTRUCTIONS TO THE JURY, THE TRIAL COURT SHOULD HAVE GRANTED A NEW TRIAL AND ITS FAILURE TO DO SO, UPON A PROPER MOTION AGAIN BRINGING TO ITS ATTENTION FULLY THE PREJUDICIAL EFFECT OF THE ERRONEOUS INSTRUCTIONS, CONSTITUTED AN ABUSE OF DISCRETION AND REVERSIBLE ERROR.

The insufficiencies of the instructions were more than fully discussed and brought to the attention of the trial court, both before and after the giving of the charge.[85] Moreover, after the jury returned with, what appellant contends was in the light of the limitations placed upon the jury's deliberations by the court's instructions, an inevitable verdict, a motion for a new trial was filed, which fully covered the issues here discussed[86] and the points of law were amply briefed and argued.[87] Yet, nevertheless, the trial court saw fit to deny the motion.

The granting or refusal of a new trial, while generally speaking a matter of discretion, is nevertheless subject to review where the discretion is abused.

> *Georgia-Pacific Corp. v. United States* (CA 5th,1959), 264 F.2d 161

Moreover, the granting or refusal of a new trial on account of alleged errors of law occurring in the course of the trial are not matters of discretion, and are fully subject to review by the appellate court. This is particularly true where a party has been

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[85]N.B. the trial court's remark: "I want to comment, by the way, that I enjoy this. It is not often we have the opportunity to discuss proposed instructions at such length." Tr. 484; and see, generally, Tr. 481-494.

[86]Tr. 67-69.

[87]Tr. 70-72, 77-78.

prejudiced—and the probable result of a trial changed —by the giving of erroneous instructions to which proper exception was taken.

Smith v. United States (1896), 161 US 85, 16 S.Ct.483, 40 L.ed.626

And see:

2 Am.Jur. "Appeal and Error", Sec. 101, at pp. 911-912 and cases there cited.

In the present case, the verdict of the jury confirmed the apprehensions of the defendant with respect to the damaging effect of the instructions objected to. The trial court should have granted a new trial. Failing in this, a new trial should be granted by this Court.

VII. THE ACTIONS OF THE TRIAL COURT IN INVADING, BY ITS INSTRUCTIONS, THE PROVINCE OF THE JURY AND UNDULY RESTRICTING THE EXERCISE OF THE JURY'S FACT-FINDING FUNCTIONS ON THE ALL-IMPORTANT ISSUES OF INTENT AND SELF-DEFENSE, DEPRIVED THE ACCUSED OF HIS CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY TRIAL, AS GUARANTEED TO HIM BY ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES AND THE FIFTH AND SIXTH AMENDMENTS THERETO.

Article III, Section 2, Clause 3 of the Constitution of the United States provides that "The Trial of all Crimes except in Cases of Impeachment, shall be by Jury * * *." This guarantee extends to the incorporated territories of the United States.

Rassmussen v. United States (Alaska, 1905), 197 US 518, 25 S.Ct.514, 49 L.ed.862

Thompson v. Utah (1898), 170 US 347, 18 S.Ct. 620, 42 L.ed.1061

The rights of the accused guaranteed by this clause are specifically enumerated and implemented in the Sixth Amendment to the Constitution.

Callan v. Wilson (1888), 127 US 549, 8 S.Ct. 1301, 32 L.ed.223

Moreover, the "due process" clause of the Fifth Amendment also covers the guarantee of a fair and impartial trial by jury and failure to strictly observe these constitutional safeguards renders the trial and conviction for a criminal offense illegal and void.

Baker v. Hudspeth (CCA 10th,1942), 129 F.2d 779, cert.den. 317 US 681, 63 S.Ct.201, 87 L.ed.546.

Thus, for example, it has been held under the provisions of the Sixth Amendment, that a trial court in a criminal case tried by a jury is without the right to express an opinion on the ultimate issue to be decided by the jury, except in the particular situation wherein the facts are not in dispute. In a criminal case, the expression of an opinion by the trial judge on the merits and on the issue which the jury is to determine is an abridgment of the right to a speedy and public trial by an impartial jury, guaranteed by this Amendment.

United States v. Meltzer (CCA 7th,1938), 100 F.2d 739

The bars which guard the right to a "fair trial" such as is guaranteed by the Constitution, include court procedure, rules of evidence and *proper instructions to the jury,* and those bars must not be lowered.

Miller v. United States (CCA 10th,1941), 120 F.2d 968

Thus it has been held that the jury must be allowed to deliberate on *all* issues. There cannot be a directed verdict in a criminal case, in whole or in part.

United States v. Taylor (CCA 10th,1882), 11 F.470

Hence it follows, that *all* issues of fact are for the jury and instructions which purport to resolve any such issue are prejudicial.

Brooks v. United States (CA 5th,1957), 240 F.2d 905

In the present case, the trial court, by its instructions to the jury—and by its refusal to give those instructions which were requested by the defendant—effectively took from the jury the issues of self-defense and the existence or absence of the intent to kill. It was, in effect, as if the court had directed a verdict on these issues. Having been deprived of their liberty to conclude that there was self-defense, the jury was compelled to find the defendant guilty of some degree of homicide. And having been peremptorily instructed with respect to the issue of intent, as well as having been led to confuse "intent" with "premeditation" and "malice", the jury was inevitably led to find the defendant guilty of murder in the first degree.

Thus the learned trial judge, innocently and with good intentions,[88] but with devastating effect upon the rights of the accused nevertheless, compelled the result of the trial below and deprived the appellant as

[88]The record shows that, on the whole, the trial was conducted with exemplary fairness and impartiality.

effectively of his right to a jury trial as if the court had attempted to direct a guilty verdict in so many words.

As was recently said so well in *United States v. Ogull* (DC NY,1957), 149 F.Supp. 272:

> "What is sacrosanct in a jury trial, is the right of the defendant to have the jury deliberate and apply the law free from judicial trammel."

The record in the present case indicates that the defendant here is to be deprived of his liberty for the balance of his natural life, as a result of a trial which violated this sacred right and which deprived him of a basic guarantee, vouchsafed him by the Constitution of the United States. Accordingly, the judgment below should be reversed and a new trial granted.

CONCLUSION[89]

The appellant in the present case, stands condemned of the most serious crime known to civilized society, that of deliberate and premeditated murder. He is under sentence of imprisonment for the rest of his natural life, the extreme penalty permissible under the laws of Alaska. This has come as the result of a jury trial, fairly and impartially conducted on the whole, which found arrayed against each other in irreconcilable conflict, two groups of eye-witnesses, present at the killing. One, a group of men friendly to the deceased, the other, a group of men whose testimony supports that given, in great and specific detail,

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[89]Because of the gravity of the cause, appellant begs the Court's indulgence of a brief recapitulation at this point.

by the appellant himself. Despite this sharp conflict, large areas of agreement exist and, in the final analysis the issues which had to be resolved by the triers of the facts, sharpened into two disputed points:

(1) Whether the appellant, in arming himself and returning to the bar where, a few fleeting moments before, he had been feloniously assaulted—with a deadly weapon—by the deceased, he was motivated by a premeditated intent to kill and activated by malice and evil purpose, or whether he returned for the lawful ends of reclaiming his property forcibly wrested from him and disarming and arresting his assailant; and

(2) whether or not upon his return to the Esquire Club he was once again subjected to an assault which threatened his life and, reacting instinctively, cut down his assailant in justifiable self-defense.

Clearly, there was persuasive evidence to support either theory. In favor of the prosecution's case was the testimony of appellant's alleged threats against the deceased at the time the latter first assaulted him; the manner in which he is said to have forced his way into the bar and the claim (challenged, however, by the physical fact of the presence of the deceased's automatic weapon on the tavern floor immediately following the shooting) that at the time appellant reentered the bar, the deceased had returned his pistol to his pocket and was trying to pull it out when he was shot down.

Against this stands the equally emphatic testimony of the appellant that, after having been made the

victim of an unprovoked felonious assault upon his life and forcibly deprived of his property, he returned to a public place, where he had a right to be, with the intention of reclaiming his money and disarming the aggressor; that he entered carrying his gun pointed down and did not raise it and fire until after he was once again confronted with the deceased's lethal weapon, which he knew to be loaded and which was aimed at appellant at point blank range. Moreover, there is offered evidence (albeit disputed) to the effect that appellant, instead of fleeing the scene of his supposed crime, voluntarily laid down his weapon and drove to the nearest place which had a telephone, whence he called the police and returned, submitting himself meekly to arrest.

Faced with this conflicting evidence, no one can predict how the jury might have resolved these conflicts, if left to its own devices. It might have found, for instance, that while the appellant armed himself with the intention of shooting the deceased upon his return, this was done in anticipation of the existing and continued threat to appellant's life and in defense of his property or in the pursuit of his statutory duty (to apprehend the felon who had just assaulted appellant and his friend), or for both of these reasons. The jury might have found that, enraged by the initial assault, the taking of his property and the attempt to lock him out, appellant returned to cut down the deceased in a burst of passion.

Unfortunately, the jury here was deprived of its constitutionally guaranteed freedom to deliberate upon

all the facts and to resolve the conflicts of evidence before it. *First,* the jury was told peremptorily that the assault upon appellant's life had ended when he returned to the bar; without being cautioned that it was free to find that such assault was renewed or revived, or that a new assault took place thereafter, which might have entitled the appellant to fire in self-defense. *Secondly,* the jury was charged that so long as appellant intended to shoot the deceased, when he armed himself and returned to the club, it could not find that he acted in self-defense; without being cautioned that there could still be self-defense if such intent to shoot was not unqualified, but depended upon whether or not the threat to appellant's life was continued or renewed, and thus appellant had armed himself with the intention of protecting himself, his friends and his property, rather than to murder the deceased.

Having thus been deprived of his shield of self-defense, the appellant was dealt the *coup de grâce* by the insidious combination of several confusing instructions, pertaining to intent, and equating intent with intention, premeditation and malice, thus inevitably misleading the jury into the grave error of concluding that the mere act of returning with the intention to shoot, constituted homicide with malice and premeditation. To top it all off, there was given an improper and prejudicial instruction on the abstract issue that a person may be presumed to intend the natural consequences of his "act", an instruction which has been universally condemned in all cases

where the facts and circumstances surrounding a shooting or killing have been detailed by eye-witnesses and where the intentional character of the act is admitted by the traverse of self-defense. From this it necessarily resulted that the jury must have concluded that, even if there was no evidence at all that the appellant did indeed intend to shoot the deceased, when appellant armed himself and returned to the Esquire Club, nevertheless such intention should be *presumed* from the mere fact that he did so arm himselm and shoot the deceased.

The net result of this unfortunate chain reaction of confusing and ambiguous instructions, was to take from the jury the two crucial issues in controversy referred to above—thus virtually directing a verdict of guilty, and indeed of guilt in the highest possible degree. By thus taking from the defendant his constitutionally guaranteed right to an untrammeled trial by an impartial jury, the appellant is to be deprived of his liberty for the balance of his natural life, in clear violation of specific guarantees contained in the Constitution and the Bill of Rights.

Accordingly, appellant earnestly contends that the judgment of the trial court below should be reversed and the case remanded with instructions to grant him a speedy new trial by jury.

Dated, February 11, 1960.

Respectfully submitted,
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No. 16,250

IN THE

United States Court of Appeals

For the Ninth Circuit

BERNARD G. HOUSE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

No. 16,250

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BRIEF FOR APPELLEE.

JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291 and 1292 prior to the amendments appearing in Public Law No. 85-508 72 Stat. 339.

COUNTERSTATEMENT OF THE CASE.

At approximately 6:00 A.M. on May 21, 1957, appellant, Bernard G. House, entered the Esquire Club (TR 282, 283, 338) which is located about one-half mile south of the City of Fairbanks, Alaska (TR 117). The Esquire Club was owned and operated by Jack Perry (the victim) and his partner, Eva Beree (TR 132, 452).

Upon entering the Esquire Club, House met Dean Scott, a good friend whom he had known for approximately five years (TR 281). Thereafter, Scott and House started rolling dice for drinks and at the same time making side bets (TR 283, 339). About an hour and one-half after House entered the Esquire Club (TR 283) he had lost all his money (TR 339, 367, 418), so he proceeded to his apartment to obtain additional funds (TR 284, 339, 418). Upon his return the dice game resumed (TR 284).

At approximately 8:00 A.M. on May 21, 1957, George C. Murray and two of his friends entered the Esquire Club (TR 117, 118), and sat at the bar about four stools away from House and Scott, talking with Jack Perry (the victim) (TR 118, 119). In the meantime House and Scott started arguing wherein House accused Scott of cheating (TR 119). Thereupon, Perry walked down to House and Scott and told them that there was to be no cheating or gambling in his place and "either sit down and drink or get out." (TR 119, 188, 476). House started arguing with Perry and he again told him to either sit down and drink or get out

(TR 119). Perry then pulled a pistol and started waving it in front of House telling him again to get out or sit down and drink (TR 119). Then House said, "Don't point that pistol at me" (TR 119). "I'll get your ass" (TR 119). "I will get it today or tomorrow" (TR 119, 188, 199). "I'll get you" (TR 119). He then left the Esquire Club and Perry bolted the door from the inside (TR 288, 301, 315, 370). There is conflicting testimony that prior to House being locked out of the Esquire Club, that Perry snapped the trigger of the pistol while waving it in House's direction (TR 147-150, 238, 287, 314, 315, 369, 409, 421). There is also conflicting testimony that when House left the Esquire Club, Perry refused to let him retrieve his money which was lying on the bar (TR 150, 151, 288, 315, 421).

In a few seconds or a minute House returned and kicked on the door (TR 119, 299, 402, 422). Perry yelled, "Don't let him in" (TR 119, 203, 316, 325). Someone unbolted the door and House came running into the Esquire Club (TR 299) with a 12-gauge shotgun (TR 120, 299) and stated, "Now I got you, you son-of-a-bitch" (TR 120, 188, 189, 465). "You just sold me your ass" (TR 465). As House rushed into the Esquire Club, Perry was standing behind the bar facing away from the door (TR 120, 155). The government's witnesses are positive that Perry did not have a pistol in his hand when House came running in with his shotgun (TR 120, 121, 154, 155, 205, 206, 209, 210). As Perry tried to duck under the bar, House raised his shotgun to his shoulder (TR 206) and shot

him in the back (TR 120, 301). In the words of House the shooting took place as follows: "When I raised the shotgun he made a movement to get down behind the beer cooler." "When he turned sideways, it was a matter of a flashing second, I pulled the trigger. It caught him, I guess, in the side" (TR 423, 424). House continued by saying: "I didn't intend to kill the man" (TR 423). "I intended to disarm him if he had the gun on him and at least turn him over to the law or at least turn him over to somebody" (TR 423). As Perry fell to the floor, Murray ran behind the bar and saw him reaching in his right hip pocket trying to pull his pistol out (TR 120, 121, 157, 158). Murray then told Perry that he (Perry) was shot and took the pistol out of Perry's right hip pocket and "slung" it on the floor (TR 120, 121, 159), the pistol came to rest about three feet away (TR 229). Murray proceeded outside, by then House had moved his car to the middle of the street at which time Murray told him, "I think you ought to come back. You just shot a man. You can probably get in a lot of trouble by taking off" (TR 122). House then returned to the Esquire Club (TR 122, 129).

After witnessing the shooting, Lawrence W. Bales went outside and stopped a passing automobile and requested the driver to summon the police (TR 190, 207, 208). Bales stated that, thereafter the Alaska Territorial Police arrived in less than five minutes (TR 190).

Sgt. Young of the Alaska Territorial Police was the first officer to arrive at the scene of the shooting (TR

227). Upon entering the Esquire Club, Sgt. Young asked House where the wounded man was and House replied: "You finally got me" (TR 227, 228, 429).

At approximately 9:15 A.M. Officer Barkley of the Alaska Territorial Police arrived at the Esquire Club (TR 237). As he entered the Esquire Club, House stated: "Well, Barkley, you have been after me a long time. You've got me now" (TR 237). Barkley then said, "What happened, Johnny?" House replied, "I shot the son-of-a-bitch" (TR 237). House was then arrested (TR 237).

About the time Officer Barkley came the ambulance also arrived and Perry was removed (TR 230, 231) to St. Joseph's Hospital, where he was examined and treated by Doctor Kenneth R. Kaisch, a physician and surgeon (TR 107-109). Dr. Kaisch described the shotgun wound as being approximately four inches in diameter having been inflicted on the left side of Perry's back (TR 109, 172). Dr. Kaisch testified that Perry would have to be bending down (TR 110) or the assailant would have to be standing above him in order to get the angle of the wound (TR 110, 111). Dr. Kaisch treated Perry upon his arrival at St. Joseph's Hospital on May 21, 1957, and until Perry expired at approximately 9:30 P.M. on May 27, 1957 (TR 109, 110).

Dr. Paul B. Haggland, a physician and surgeon, performed an autopsy on Jack Perry (TR 168), and in his opinion the cause of death was the gunshot wound in his back which destroyed about two inches of the spinal cord (TR 171).

On November 7, 1957, the Grand Jury for the Fourth Judicial Division, District of Alaska, returned an Indictment charging Bernard G. House aka Johnny House with the crime of First Degree Murder in violation of Section 65-4-1 of the Alaska Compiled Laws Annotated, 1949.

On May 5, 1958, the appellant, Bernard G. House aka Johnny House went on trial before a jury, which on May 9, 1958, returned a verdict of guilty of murder in the first degree.

The appellant was sentenced to life imprisonment.

A motion for a new trial was denied and an appeal was taken to this Honorable Court.

QUESTIONS PRESENTED.

Whether the Court committed error in giving Instruction No. 12.

Whether the Court's instructions distinguished between murder in the first degree and murder in the second degree.

Whether the Court committed error in giving Instruction No. 15.

Whether the Court committed prejudicial error in not giving defendant's proposed Instructions Nos. 3, 4, 5, 6, 11 and 12.

ARGUMENT.

I

THE COURT DID NOT ERR IN GIVING INSTRUCTION NO. 12.

So that a proper analysis can be made in determining whether the Court committed error in giving Instruction No. 12, it is necessary to consider the evidence before the Court.

Jack Perry, the part owner of the Esquire Club, had ordered the appellant to leave the establishment. Although there is a conflict in the testimony as to whether Jack Perry presented a firearm the first time he told the appellant that there was to be no cheating or gambling in his place and either sit down or get out (TR 119, 188, 476), the evidence discloses that he did assault the appellant with the 380 Llama automatic the second time. After the appellant left the club, Jack Perry went to the door and locked it and placed the weapon in his pocket. When the appellant returned after securing the loaded shotgun from his automobile and kicked on the door, the deceased shouted, "Don't let him in." Witnesses appearing for the defense as well as those for the government established this fact; therefore, Jack Perry, who was originally the aggressor or had used excessive force in ejecting the appellant, had withdrawn from the affray.

Three witnesses for the government testified that the appellant had threatened, in effect, to kill Perry as he was leaving the premises (TR 119, 188, 199).

The appellant testified that when he re-entered the front door he intended to disarm the deceased and at

least turn him over to the law (TR 421-423). The appellant never claimed he also returned for the purpose of getting the money which had been lying on the bar where he and Scott had been gambling (TR 277).

Appellant did testify, "Anyway, he tried to get down behind that beer cooler. When he turned sideways, it was a matter of a flashing second, I pulled the trigger" (TR 424). Doctor Haggland testified that the deceased was shot in the back (TR 172). See Plaintiff's Exhibit "A".

The evidence discloses the only statements made by the appellant after he re-entered the club and before the shooting were, "Now I got you, you son-of-a-bitch," or words to that effect (TR 120, 188, 189, 465). Just prior to his arrest, House told the Territorial Police officer that he shot the son-of-a-bitch (TR 237).

Most assuredly the defendant had a right to have his theory of the case presented to the jury.

However, the testimony of the defendant clearly set out his defense when he stated that, ". . . I intended to disarm him if he had the gun on him and at least turn him over to the law or at least turn him over to somebody, . . ." (TR 423). The Court in Instruction No. 12 clearly set out this defense by stating as follows:

> ". . . But, if the defendant returned merely to disarm the deceased or to make a citizen's arrest, and he carried the shotgun merely for his own protection or to carry out the disarming of the deceased or to make the arrest, and he actually shot the deceased in self-defense, as defined in these in-

structions, you must find the defendant not guilty . . ."

The Court further instructed:

". . . On the other hand, if you are convinced by the evidence beyond a reasonable doubt that the defendant reentered the Esquire Club with the intention of shooting the deceased, you cannot find that he shot in 'self-defense.' This means that the rule of self-defense does not authorize one to seek revenge or take into his own hands the punishment of an offender."

Considering all the evidence in the case, this part of the Court's instruction was a correct statement of the law. After the appellant left the club he was free from danger and if he went back into the premises for the purpose of shooting Jack Perry then he was the aggressor and he could not rely on self-defense to justify the killing. *Laney v. United States,* 294 F. 412 (D. C. Cir. 1923).

The Supreme Court of the United States recognized this qualified right of self-defense in *Addington v. United States,* 165 U.S. 184, 187 (1897).

". . . On the contrary, the court said, in substance, that if the circumstances were such as to produce upon the mind of Addington, as a reasonably prudent man, the impression that he could save his own life, or protect himself from serious bodily harm, only by taking the life of his assailant, he was justified by the law in resorting to such means, *unless he went to where the deceased was for the purpose of provoking a difficulty in order that he might slay his adversary. In so instruct-*

ing the jury no error was committed." (Emphasis supplied.)

The Court again in *Andersen v. United States,* 170 U.S. 481, 508, 509 (1898) stated:

"It is true that a homicide committed in actual defence of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that his act in causing death was necessary in order to avoid the death or great bodily harm which was apparently imminent. But where there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack, the plea of self defence cannot avail. *Wallace v. United States,* 162 U. S. 466; *Allen v. United States,* 164 U. S. 492; *Addington v. United States,* 165 U. S. 184.

According to his own statement, Andersen, after he had shot the captain, thought about the mate, armed himself with the captain's pistols, went in search of his victim, and finding him aloft on the mainmast at work, called him down, or, seeing him coming down, awaited him, and shot him. He was not only the aggressor but the premeditated aggressor. . . ."

"We are not insensible to the suggestion that persons confined to the narrow limits of a small vessel, alone upon the sea, are placed in a situation where brutal conduct on the part of their superiors, from which there is then no possible escape, may possess special circumstances of aggravation.

But that does not furnish ground for the particular sufferer from such conduct to take the law into his own hands, nor for the suspension of those general rules intended for the protection of all alike on land or sea.''

In *McDaniels v. Commonwealth,* 249 S.W. 2d 546 (Ky. 1952):

'' 'Although the jury may believe that the defendant, McKinley McDaniels shot and killed the deceased, George Hammons, either as set out and defined in Instruction No. 1 above, or as set out and defined in Instruction No. 2 above, yet if the jury shall believe from the evidence that at the time he did so, he believed and had reasonable grounds to believe that either he or his wife were then and there in danger of death or the infliction of some great bodily harm at the hands of George Hammons, and that it was necessary, or appeared to him, in the exercise of reasonable judgment, to be necessary, for him to shoot, wound and kill the deceased, George Hammons, in order to avert that danger, real, or to him reasonably apparent, then the jury should find the defendant not guilty, upon the ground of self-defense, or defense of his wife, or apparent necessity therefor.

'However, this instruction is subject to the following qualifications: If the jury shall believe from the evidence beyond a reasonable doubt that the defendant, McKinley McDaniels, brought on the difficulty in which the said George Hammons was shot, wounded and killed by leaving the premises mentioned in the evidence, and later returned to the premises with his rifle, when it was not necessary, and when the defendant had no reasonable

grounds to believe it necessary to protect himself or his wife from immediate danger of the infliction on him or her of death or great bodily harm, or which reasonably appeared to him about to be inflicted on him or his wife by the said Hammons, and that the defendant thereby brought on such danger to himself, if they believe from the evidence that any such danger existed, then, in that event, the jury cannot acquit the defendant upon the ground of self-defense, or apparent necessity therefor.' "

"He insists that the second literary paragraph of that instruction was erroneous and should not have been given because the evidence showed that Hammons was the aggressor who fired the first three shots. It is true that Hammons was the aggressor during the original incident, but the question to be determined by the jury here was whether or not appellant shot in self-defense during the second engagement. It may be that decedent himself shot in self-defense when he saw appellant go to the house, arm himself, and return. It was proper for the court to submit the question of whether McDaniels brought on the difficulty when the manner by which the difficulty was precipitated is described . . ."

The Court further commented:

"We think that this instruction fairly stated the law. The law of self-defense is a law of necessity. In the absence of a need to defend, the principle should not be applied. After appellant reached a place of safety, when there was no need to return, and he, thereupon, armed himself and returned, he should not be given the advantage of an un-

qualified self-defense instruction. With a qualified instruction which described the circumstances, the jury was able to decide whether appellant's return was stimulated by necessity or fury."

Counsel also insisted that the self-defense instruction should have been qualified by one that embraced this idea:

> " 'In the event the jury believes from the evidence that appellant, in good faith, believed and had reasonable grounds to believe that the deceased Hammons had abandoned the difficulty, after meeting his wife, proceeded with such good faith belief in his mind, for the purpose of retrieving his tools and then the deceased Hammons returned to the scene and began firing at the defendant, the defendant had the right to defend himself and use such means at his command so to do, even to this the taking of the life of the deceased and in that event, the jury should acquit the defendant.'
>
> There was no intimation in the record that the tools were in danger of being stolen or that appellant was acting in defense of his property, and such an instruction omits entirely the essence of the requirement that the plea of self-defense is forfeited by aggression of the accused; presents the converse of the question of whether appellant abandoned the scene and brought on the difficulty by returning; ignores the question of whether McDaniels fired under the apparent necessity of averting harm to himself or his wife; turns the decision of the jury solely upon the 'good faith belief' in appellant's mind, and is, we believe, improper."

In *People v. Walters,* 194 N.W. 538, 540 (Mich. 1923):

> " 'A killing is not justifiable on the ground of self-defense if the defendant, after a difficulty between the deceased and himself had terminated, or after he had had an opportunity to decline combat, continued the struggle or renewed the affray, the result of which was the homicide; and that is the rule, irrespective of who was at fault in the original encounter. The defendant fails to make out a case of self-defense where the evidence shows he renewed a difficulty after the deceased abandoned it.' "

Woodward v. State, 177 So. 531 (Miss. 1937);
Lewis v. State, 195 So. 325 (Miss. 1940);
State v. Shepherd, 17 S.E. 2d 469 (N. C. 1941);
People v. Burns, 149 Pac. 605, 610 (Calif. 1915);
State v. Meyers, 125 P. 2d 441 (Ariz. 1942).

Although the facts are not identical, they are not so dissimilar that the rule of law stated in *Johnson v. Commonwealth,* 147 SW 2d 1048, 1051 (Ky. 1941) cannot be cited in support of the Court's instruction, wherein the opinion read:

> ". . . As he approached deceased his pistol was then drawn and his actions and words were such as to clearly indicate to the deceased that he was in great danger. So that, even if deceased had then endeavored to draw his double-barrelled shotgun on appellant the latter was responsible therefor, since he created the situation justifying deceased in doing so. Therefore, the case clearly and most manifestly comes within the rule—so often

> declared by this and other courts and denied by none—that one may not shelter under his right of self-defense when he himself brought on the immediate difficulty in which the alleged danger to himself occurred, and that though accused might have availed himself of the right of that defense if he had acted earlier in the melee, yet if his antagonist abandoned that immediate difficulty and was later attacked by defendant in circumstances authorizing the deceased to himself become the aggressor in exercising his right of self-defense, then the crime committed by defendant may not be justified under his like right."

The jury had sufficient evidence from which they may well have found that the appellant, after he had been ejected from the club, returned to the scene of the former assault by Perry, armed and in search of the deceased and with the intention of shooting him. Therefore, the appellant could not claim to have acted in self defense. *State v. Clay,* 210 N.W. 904, 905 (Iowa 1926).

Counsel for appellant in his brief cites *Thompson v. United States,* 155 U.S. 271 (1894) which can be distinguished from the present case on the facts as stated in the opinion as follows:

> "He further states that he rode on to Checotah's, where he left the bundle; that he got to thinking about what Sam Haynes had told him as to the threats that Hermes had made, and as there was no other road for him to return home by, except the one alongside of the field, he thought it was best for him to arm himself so that he could make a defence in case he was attacked; . . ."

In our case, appellant was not required by his position to re-enter the club, especially in view of the fact that he was confronted by a bolted door and found it necessary to kick at the door to gain entry.

Trial counsel objected to the instruction on the grounds that he believed the defendant would still have the right of self-defense even if he re-entered the club for an improper motive; if he were then placed in a position where he could reasonably anticipate death or great bodily harm. The law previously cited to the Court in this brief does not support his theory.

Nor was the instruction a mandate to find against the defendant on the issue of self-defense as now urged on appeal.

It is also argued that the Court committed error when it instructed that, "The assault with a dangerous weapon made upon the defendant by the deceased before the defendant left the Esquire Club had ended", because the Court invaded the province of the jury. The Court made this determination as a matter of law, as all the witnesses had agreed that the defendant left the club and the door was then locked. Trial counsel recognized the fact that the first assault had ended where he stated, "Your Honor, commenting on the longer of the two instructions, there is evidence really here of two assaults with a deadly weapon by the deceased, the first being practically uncontradicted by all the witnesses as to the incident before leaving the club. If certain witnesses are to be believed, as the defendant re-entered the club, the deceased again in effect assaulted him with a deadly weapon, because the pistol

was pointed at him as he entered the door. I was wondering whether in that first paragraph—it is quite clear to me that your Honor is referring to the first assault because 'justify the defendant in re-entering the Esquire Club,' that is probably clear enough" (TR 481, 482).

A federal trial judge has the right to sum up and comment on the evidence. *Shaw v. United States,* 244 F. 2d 930, 939 (9th Cir. 1957).

II

WHEN INSTRUCTIONS NO. 4 AND NO. 5 ARE CONSIDERED TOGETHER, THERE IS A PROPER DISTINCTION BETWEEN FIRST DEGREE AND SECOND DEGREE MURDER.

The Court's Instructions No. 4 and No. 5 distinguished for the jury the difference between first and second degree murder.

Instruction No. 4 provided:

> ". . . To deliberate means to take into consideration, to ponder and to weigh, although not necessarily prudently or wisely, such reasons for or against a proposed action as come to the mind of a person contemplating the action and whose capacity to exercise judgment has not been destroyed by emotion or passion.
>
> To premeditate a certain action means to think about such action before doing it, so that one reaches a positive decision to take the action and conceives a plan or method by which he will undertake to achieve the intended result."

Instruction No. 5:

"To constitute murder in the first degree, the killing must be accompanied by a clear, deliberate intent to take life. The intent to kill must be the result of deliberation and must have been formed upon a pre-existing reflection and not under a sudden heat of passion or other condition such as precludes the idea of deliberation. The law does not require as an essential element of murder in the first degree that a prescribed or standardized amount of time be used in the deliberation or elapse between the formation of the intent to kill and the act of killing. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder in the first degree."

This instruction did not state that there need be no appreciable length of time between the formation of the intent to kill and the killing itself; it may be as instantaneous as successive thought which was so objectionable in *Jones v. United States,* 175 F. 2d 544 (9th Cir. 1949), but exactly the opposite that the true test is not the duration of time, but rather the extent of the reflection and the intent to kill must be the result of deliberation and must have been formed upon a pre-existing reflection. The jury was told that to premeditate means to think about it, before doing it,

so that one reaches a positive decision to take the action and conceives a plan or method, which was approved in *Fisher v. United States,* 328 U. S. 463 (1945).

Instruction No. 5 was not objected to by counsel and even if the Court chooses to consider it under the plain error rule, the instructions considered together meet the standard required.

III

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 15.

Instruction No. 15 reads as follows:

> "Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.
>
> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

> In determining the issues as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind."

Trial counsel said, ". . . the only exception I take to the instruction is that on this question of intent the instruction fails to include the testimony of the defendant and I was going to suggest that the very last paragraph at the end of the instruction, in the last sentence, a comma be placed, and the words 'including the testimony of the defendant' be added."

> "The Court. I must be looking at the wrong place. Is that No. 15?
>
> Mr. Kay. Yes, sir, as to proof of intent.
>
> The Court. I think that is included but not specifically.
>
> Mr. Kay. I think undoubtedly it is, too, Your Honor . . ." (TR 492, 493).

It is difficult to see how this can be considered an objection as required by Rule 30 of the Federal Rules of Criminal Procedure.

The lower Court in *Allen v. United States,* 164 U.S. 492, 496 (1896) instructed in a murder case where self-defense was an issue and eye-witnesses gave testimony that:

> " 'The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which it is known will produce a particular result is

> from our common experience presumed to have anticipated that result and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design that it is not necessary to prove that such design existed for any definite period before the fatal bullet was fired. From the very fact of a blow being struck, from the very fact that a fatal bullet was fired, we have the right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant.' "

The Supreme Court of the United States stated:

> "This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act."

In *Agnew v. United States,* 165 U.S. 36, 59 (1897), the Supreme Court in analyzing the lower Court's instruction stated:

> "This was in application of the presumption that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent. 1 Greenl. Ev. §18; 3 Greenl. Ev. §§13, 14; Jones on Ev. §23; Bishop Cr. Proc. §§1100, 1101; and cases cited.
>
> The Circuit Court, however, told the jury that the presumption of the intent to injure and defraud, if the facts were found as stated, was not conclusive, but, in substance, that its strength was such that it could only be overcome by evidence that created a reasonable doubt of its correctness; in

other words, that as the presumption put the intent beyond reasonable doubt, it must prevail, unless evidenec of at least equivalent weight were adduced to the contrary.

The question of the particular intent was not treated as a question of law, but as a question to be submitted to the jury, and conceding that the statement of the court that the evidence to overcome the presumption must be sufficiently strong to satisfy the jury 'beyond a reasonable doubt' was open to objection for want of accuracy, we are unable to perceive that this could have tended to prejudice the defendant when the charge is considered as a whole."

Just as in the *Agnew* case Instruction No. 15 did not treat the question of intent as a matter of law, but as a question of fact for the jury to determine.

The important words in this instruction which distinguish this case from those cited by appellant are, "*so unless the contrary appears from the evidence,* the jury may draw the inference . . ." (Emphasis supplied.)

In Instruction No. 29, the jurors were advised:

"If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instructions, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance."

The jury was also told that intent was an essential element of the crime and it was to be determined by the jury from consideration of all the facts and circumstances in evidence. The Court further instructed the jury that the burden of proving every fact material and necessary to a conviction by competent evidence beyond a reasonable doubt is on the government and does not at any time or under any circumstances shift from the government. As stated by this Court in *Bateman v. United States,* 212 F. 2d 61, 70 (9th Cir. 1954), ". . . Counsel has singled out one instruction in claiming error without regard to the instructions considered as a whole." *Legatos v. United States,* 222 F. 678, 687 (9th Cir. 1955).

In *Rosenbloom v. United States,* 259 F. 2d 500, 503 (8th Cir. 1958) where the lower Court's instruction, that was objected to on the ground that specific intent may not be presumed but must be proven, stated in part, "The presumption is that a person intends the natural consequences of his act, and the natural presumption would be that if a person knowingly or intentionally did not report all of his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax on the unreported income."

The Court also in its opinion cited *Grayson v. United States,* 107 F. 2d 367, 370 where the trial court had instructed the jury that the defendant was presumed to intend the natural consequence of her acts. "It was urged that this invaded the province of the jury in that it raised a conclusive presumption of intent. Answering this contention this Court said:

> 'There is, of course, no presumption of law to that effect. (Citing cases.) The use of the words "presume" or "presumption" in this connection is not to be approved. No doubt inferences as to intent may be gathered from subsequent acts and conduct, but no presumption of law follows to invade and restrict the province of the jury. However, we do not think the language employed had that effect in the instant case. The question of the particular intent was not treated as a question of law, but as a matter to be submitted to and resolved by the jury. The charge as a whole must be considered. In this same paragraph the jurors are admonished that they would be justified in finding the intent only from all the evidence in the case.' "

In *Cramer v. United States,* 325 U.S. 1, 31 (1945), the Court said:

> "Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts. The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect the result from his acts."

In *Morissette v. United States,* 342 U. S. 246, 249, 276, the lower Court instructed as a matter of law that the intent to steal was presumed from the isolated fact of the defendant taking the property. The Court stated, "whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the

surrounding circumstances." The last paragraph of Instruction 15 which reads, "In determining the issues as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind." conforms to the standard required by the Supreme Court. *Bianchi v. United States,* 219 F. 2d 182, 194 (8th Cir. 1955).

In *Vallas v. State,* 288 N.W. 818 (Neb. 1939), the Court instructed that, ". . . the law warrants the presumption, or inference, that a person intends the results or consequences to follow an act that he intentionally commits which ordinarily do follow such act." Here, again, the Court was instructing as a matter of law when it said, "the law warrants the presumption", which was criticized in the *Morissette* case.

The Supreme Court of California follows the Nebraska rule when the charge is attempted murder, *People v. Snyder,* 104 P. 2d 639 (1940), but does not do so when the charge is murder. *People v. Cook,* 102 P. 2d 752, 757 (1940).

IV

SINCE THE DEFENDANT'S PROPOSED INSTRUCTIONS NOS. 3, 4, 5, 6, 11 AND 12 WERE COVERED IN THE COURT'S INSTRUCTIONS OR ARE NOT APPLICABLE TO THE FACTS IN THIS CASE NO PREJUDICIAL ERROR RESULTED.

Appellant alleges that the Court committed prejudicial error in refusing to give the above requested instructions. Trial counsel's only objection was, "I

except to the failure of the court to give those instructions requested by the defendant which were not given" (TR 493). This type of abortive objection was criticized in *Benatar v. United States,* 209 F. 2d 734, 743, 744 (9th Cir. 1954) where the Court stated, "In other words, he should have shown that the requested instruction was relevant, in the light of the evidence adduced in the present case." "It is true that a fundamental instruction should be given by the court, regardless of a proper request or objection. But an instruction that needs to be related to the facts at bar in order to be proper, is not a fundamental one." It is precisely to such special instructions, related to the particular facts of a given case, that Rule 30 of the Federal Rules of Criminal Procedure applies. If every failure to give such instruction is to constitute "plain error" so as not to require a proper request or objection, we might as well jettison Rule 30 altogether.

The appellant's specification of errors does not conform to Rule 18 (2)(d) of this Court. *Kobey v. United States,* 208 F. 2d 583, 587, 588 (9th Cir. 1953).

Since the Appellate Court often considers the requested instructions anyway, to resolve all doubt, appellee deems it advisable to comment on them.

Instruction No. 3 (TR 29) would not be applicable to the facts in the present case unless the Court first determined that the defendant remained at the scene of the homicide and did not attempt to flee or run away. Murray testified that the appellant left the bar after the shooting and was in his car out in the middle of the street. However, the appellant came back inside

the club after Murray told him, "You can probably get in a lot of trouble by taking off" (TR 122). If the jury found that the appellant left the club to call the police as he testified then they would under the Court's instructions consider what bearing it had on the appellant's intent.

This is a special instruction rather than a fundamental one; thus the Court was not required to give it even if properly stated.

Proposed instructions Nos. 4 and 5 (TR 29, 30), being special in nature, were adequately covered by the Court's general instruction on self-defense (TR 50, 51).

Proposed instruction No. 6 (TR 30, 31) was not a correct statement of the law applicable to the evidence in this case as previously argued in our brief on the Court's Instruction No. 12, because the appellant did not have a legal right to return to the barroom after being ejected unless he returned to disarm the deceased or make what in effect was a citizen's arrest. The cases cited by appellant in support of the proposed instruction are not in point.

Proposed instruction No. 11 (TR 33) was incorporated in the Court's Instruction No. 12, and the District Judge commented on the citizen's arrest as follows: "I think it does and I think the jury is well enough apprised without a lot of instruction about a citizen's arrest and the rights, because nearly every one, if not all, understood that; in answer to questioning, they said they understood the right of an individual to make an arrest (TR 489).

The judge also commented: "He said words that I construed as being tantamount to a citizen's arrest, and I am construing it favorable to the defendant, I believe." Trial counsel replied, "It is layman's language." A trial judge is never bound to instruct a jury in the exact language requested. *United States v. Walker,* 260 F. 2d 135, 152 (3rd Cir. 1958).

Proposed instruction No. 12 which reads, "A person, who has been forcibly deprived of personal property has a right to defend that property and demand its return", does not conform to any issue in the case. Trial counsel in his statement to the jury said, "He will tell you that he was humiliated, that he was angry, that he was determined to get the sum of two hundred dollars which he had left on the bar back . . ." (TR 277). The appellant did not testify that he came back to the Club to get his property.

Surely the statements of counsel cannot be the basis for giving an instruction. Furthermore, there is no evidence that the deceased ever took the money off the bar before or after the appellant left. Here the trial Court fulfilled its duty by instructing on the general principles of the law of the case and was not required to include in its instructions what is not the law of the case nor to outline all possible or probable factual situations.

Since the instructions considered together fairly informed the jury of the standards to apply to the homicide charge, the trial judge did not abuse his discretion in denying the motion for a new trial.

CONCLUSION.

For the reasons and the law set forth herein, appellee requests this Court to affirm the judgment of the Court below.

Dated, Fairbanks, Alaska,
March 14, 1960.

Respectfully submitted,

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No. 16255

United States
COURT OF APPEALS
for the Ninth Circuit

CARL E. THORSON,

Appellant,

vs.

INLAND NAVIGATION COMPANY,
a Corporation,

Appellee,

vs.

ARCHER-DANIELS-MIDLAND CO.,

Third Party Appellee.

IN ADMIRALTY

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 12-58

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

INDEX OF EXHIBITS

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IN ADMIRALTY

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

JURISDICTION OF THE COURT

The within cause comes within the admiralty and maritime jurisdiction conferred upon the United States by the United States Constitution, Article III, Section 2.

STATEMENT OF CASE

This is a suit in admiralty brought by libelant, Carl E. Thorson, a longshoreman who was injured in the

course of his employment while engaged in discharging bulk grain from the hold of a large barge operated by respondent, Inland Navigation Company, a corporation.

The respondent was and is a common carrier, engaged in interstate commerce on the Columbia River, transporting petroleum products into the interior and transporting grain from the interior to tidewater.

In the furtherance of its enterprise respondent uses tug boats and barges. The barges have two decks, petroleum being carried in the lower hold on the upstream trip and the upper deck being used for bulk grain cargo on its return.

The barge on which libelant was injured was lying in the navigable waters of the Columbia River at the Port of Vancouver, Washington, and its cargo of bulk grain was being discharged by means of a suction device comprising a suction fan and flexible tubes, said tubes extending into the holds of the barge, it being the duty of the longshoremen to control the mouth or open end of the tubes where grain is picked up by suction and carried to the storage bins of the grain elevators.

The barge involved in this case was numbered 501 and has several hatches. When grain was discharged from one, the suction tubes would be mechanically hoisted and swung by hand lines to another hold as the work progressed.

The barge being used for transporting petroleum, it was required by law to carry a red flag, commonly known as a Baker flag. The flag consisted of sheet metal

one-eighth of an inch thick, sixteen inches wide at the stem end, tapering to twelve inches, and is twenty-four inches long, and weighs about twenty-five pounds, the flag welded to a stem consisting of a one-and-one-fourth inch iron pipe, said stem was about a foot long. The flag was mounted at the bow of the barge by slipping the stem of the flag into the top end of a larger pipe, which larger pipe was welded to the deck.

The Baker flag on this barge was therefore free to be lifted out and free to swing on its pivot. The Baker flag assembly was positioned above and about eight feet from No. 1 Hatch.

At the time of the accident libelant was in No. 1 Hatch. The Baker flag became dislodged and fell into the hatch, striking him on the head and shoulders, causing him to suffer injuries.

No one saw the flag become detached and it was not seen until it came flying through the hatch to strike libelant.

At the time of the accident there was a ship lying alongside, its hawsers extending over the barge.

Some of the respondent's barges had the Baker flag rigged differently—some had longer flag stems to slip into its receptacle, some are fastened rigidly and some have the stem fastened by means of a set screw.

The libelant charges the vessel was unseaworthy in that said signal flag was not properly secured to the vessel, but was loose in its socket and positioned where it was wont to fall into the hold of said vessel, and that libelant suffered injuries by reason thereof.

The foregoing statement of facts is based upon the Transcript of Testimony, pages 10 to 20 inclusive, and upon Exhibits Nos. 21, 22, 23 and 24, said exhibits identified and received in evidence by stipulation (Tr. 5).

THE ISSUE TO BE DETERMINED ON APPEAL

Was the barge No. 501 unseaworthy in that the Baker flag was not properly secured to the vessel but was loose in its socket and positioned where it was wont to fall into the hold of said vessel, and was such unseaworthiness the proximate cause of the accident and the injuries suffered by libelant?

ARGUMENT

Since *The Osceola* case, 47 L. Ed. 760, it is a settled rule of law that the vessel and her owner are liable to indemnify a seaman for injuries caused by the unseaworthiness of the vessel, its appliances and gear.

It is equally well settled that a longshoreman, engaged in discharging cargo from a vessel in navigable waters, is a seaman. *Seas Shipping Co. v. Sieraki,* 328 U.S. 88, 90 L. Ed. 1099; *Pope & Talbot v. Hawn,* 346 N.W. 406, 98 L. Ed. 143.

There is no conflict in the evidence in the case at bar. Respondent does not dispute the fact that the Baker flag was not secured other than by slipping its foot-long stem into a vertical pipe of larger diameter. There is no conflict in the evidence that other barges used by re-

spondent in the same service had fixed stems (Tr. 14-15), and that some Baker flags were secured by means of a set screw (Tr. 20).

Respondent contends that the Baker flag, while required by law as a warning that the barge was carrying petroleum, was also used as a wind indicator and had to swing freely. However, it would seem a small excuse, since a twenty-five pound flag with its stem slipped into another pipe would seem a mechanical monstrosity as a wind indicator, and in any event, there is no reason why even a wind indicator appliance may not be unseaworthy.

In determining whether a vessel's appliances are seaworthy one must be mindful of the conditions which the vessel would normally meet. Here we have a barge—a vessel riding low in the water, regularly moored where ships whose decks are comparatively high, with hawsers extending over the barge (Tr. 12). The tightening up of the hawsers might well dislodge any appliance of the barge which is not properly secured. Further, the device used for unloading, having hand lines in its operation, may get caught by the wind and be blown around to dislodge any appliance not properly secured. Any of these dangers could be easily recognized by the owner, and in fact, the owner met the problem by securing the Baker flag on other barges by using a fixed stem or in securing the same by use of set screws.

A seaman engaged in work in a hold below such an unsecured appliance, does not have a reasonably safe place in which to work.

A recent case in point is *Wiel and Amundsen, A/S. as Claimants of the S. S. Romulus, Appellant, v. Roy E. Potter, Appellee,* 228 F.2d 341:

> "The action was brought by a longshoreman, who, while loading lumber in forehold of ship, fell onto deck beneath when a removable rod, constituting a part of fencing railing above deck just forward of opened forehold, gave away in his hands as he moved to his right from lumber on left side of ship, evidence would sustain findings (1) that longshoreman had not been negligent in proceeding on narrow part of foredeck protruding over hold and relying on loose rod to sustain him instead of moving over lumber itself or climbing over fencing and proceeding over foredeck, and (2) that shipowner had been negligent and its ship unseaworthy because top rail had been loose and not fixed permanently or secured and because there had been no cotter pin inserted in slot in rod to make it fast to railing."

In *Yarbrough v. American Mail Line,* 119 F. Supp. 776, a seaman was injured when a defective heel block became loose, was lowered precipitately and hit the libelant on the head. A finding that the vessel was unseaworthy was made as a matter of course. The Court said:

> "The accident having been caused by faulty equipment under control of respondent shipowner, there is liability for consequential injury whether we call it unseaworthiness or failure to furnish a safe place to work."

In *Williams v. Lykes Bros. S. S. Co.,* 132 F. Supp. 732, a heavy supporting stanchion, without apparent cause, fell over and struck a longshoreman who was working in the hold of a vessel. Vessel was unseaworthy

and her owner was liable for damages. The Court said:

> "The evidence does not offer an explanation as to why the stanchion fell, except the inference that it was improperly placed."

Likewise, in the case at bar, the evidence does not offer any explanation why the flag fell. Whether the wind blew it out, a hawser tightened to dislodge it, or other lines caught by the wind was the cause, is not known. Suffice to say the flag was not properly secured to meet conditions which it was bound to meet in the normal course of the service to which it was put.

In *Johnson v. United States,* 333 U.S. 46, 56, 92 L. Ed. 468, a seaman engaged in taking slack out of a rope attached to a cargo boom, one end of which was held by another seaman on an upper deck, was, while bending over to coil away the rope which he had drawn through the blocks, struck by a block which from some unexplained cause fell from the hands of a co-worker.

The Court invoked the rule of res ipsa loquitur and said:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events. In this case the District Court found negligence from Dudder's act of dropping the block since all that petitioner was doing at the time was coiling the rope. The Circuit Court of Appeals reversed, 160 F. 2nd 789, feeling that petitioner might have pulled the block out of Dudder's hands. It reasoned that although petitioner testified he was bending over coiling the rope when the block hit him, the concussion may have caused a lapse of memory which antedated the actual in-

jury. The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act."

The Court below, in its memorandum opinion (Tr. Rec. Vol. 1, page 19), and in its finding of fact (Tr. Rec. Vol. 1, page 21), said:

"The evidence reveals that lines and gear of the stevedore hung freely in the area, these lines and unloading gear were not part of the barge's gear."

The Court below was apparently unmindful of the rule in *Peterson v. Alaska S. S. Co.,* 205 F.2d 478, affirmed, 347 U.S. 396, 98 L. Ed. 798.

In this case a longshoreman was injured by faulty gear which was assumed to belong and brought aboard by the stevedoring company.

The Court held:

"A shipowner is liable for injuries suffered on his ship by a stevedore and resulting from unseaworthiness of equipment, even though the equipment is not shown to belong to the shipowner or to be part of the ship's equipment, but is assumed to belong to the stevedore's independent employer, as a part of that employer's loading equipment, brought on board by such employer."

In this case the Court said:

"If the block was being put to proper use, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy.

> "In making this inference we do not rely upon the tort doctrine of res ipsa loquitur, here we are dealing with a specie of strict liability regardless of fault."

We submit that an unsecured Baker flag on a barge used in the service where hawsers and hanging lines are apt to dislodge it where it would fall into the hold, is not a seaworthy device, and a longshoreman required to labor within striking distance is not provided a reasonably safe place to work.

Respectfully submitted,

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By.....
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No. 16255

United States
COURT OF APPEALS
for the Ninth Circuit

CARL E. THORSON,

Appellant,

vs.

INLAND NAVIGATION COMPANY,
a Corporation,

Appellee,

vs.

ARCHER-DANIELS-MIDLAND CO.,

Third Party Appellee.

IN ADMIRALTY

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-59

SUBJECT INDEX

TABLE OF AUTHORITIES

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IN ADMIRALTY

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

STATEMENT OF THE CASE

The appellant, Carl E. Thorson, was an employee of Archer-Daniels-Midland Co., the third party appellee (Pretrial Order p. 2). Thorson chose to elect not to accept compensation from his employer, Archer-Daniels-Midland Co., but rather filed his election to sue and pursue his remedy against a third party, the appellee, Inland Navigation Company.

The appellee towed its barge containing wheat to a dock in Vancouver, Washington, on the Columbia River. Pursuant to its tariff, the appellee moored the barge and then left with its tug and was to return and pick up the barge when it was notified by Archer-Daniels (Tr. 61-62). The unloading was to be done by Archer-Daniels and no employees of the appellee were present at the time of the unloading or at the time of the accident (Tr. 63).

The baker flag not only acted as a warning that inflammables or explosives were carried, but also acted as a wind indicator. The flag was loose in its holder so that the wind could turn the flag one way or the other (Tr. 64). A cloth or similar type wind indicator would not have lasted in the Columbia gorge for even one trip (Tr. 68). It was also necessary to have an indicator or baker flag that could be easily removed as the barge went under obstacles, such as bridges, which barely cleared the deck of the barge (Tr. 66). The flag, weighing about 25 pounds, was held in its vertical holder by the force of gravity and it could not fall out. The only way it could come out was by being manually lifted out of its holder.

SUMMARY OF ARGUMENT

The barge, and particularly the baker flag and its holder, was seaworthy.

ARGUMENT

The only charge of unseaworthiness is that "the signal flag was not properly secured to the vessel but was loose in its socket and position (ed) where it was wont to fall into the hold of said vessel" (Pretrial Order p. 2).

The trial court found and concluded:

"1. The baker flag, as installed on the barge involved, was recognized gear and equipment on barges plying the same trade in the Columbia and Willamette Rivers.

"2. It was physically impossible for the baker flag to become disengaged from its standard socket through its own action and, in order to be removed and caused to be flung as it was and strike the libelant, it would have to have been manually withdrawn or cast by a person or some line would have to have become fouled with the flag which caused it to be yanked from its socket.

"(1) The fact that the baker flag moved freely within its socket did not render the barge unseaworthy.

"(2) The barge was not unseaworthy in any respect."

In accordance with *McAllister vs. U.S.*, 348 US 19, 75 S. Ct. 6, the judgment of the trial court will not be set aside unless it is "clearly erroneous." A cursory survey of the record clearly shows that the above findings are supported by the evidence.

The standard determining seaworthiness is "that equipment be reasonably fit for the use for which it was intended * * * (seaworthiness) has never been held to require the best possible equipment or to impose an insurer's liability for any and all injury to those working on shipboard * * * ." *Manhat v. U.S.,* 220 F.2d 143, 148 (9th CA, 1955).

As is apparent from the trial court's findings, the trial court did not determine what force pulled the flag out of its socket. It did find that it definitely could not come out unless it was pulled out intentionally or unintentionally. There are very few pieces of equipment or gear around a vessel which cannot be pulled loose from their position where they are held by gravity or by some fastening, if force is applied. Hatch covers, such as on this barge, deck cargo on river vessels, certain kinds of stanchions; all can easily be lifted up and are fitted or stowed with this intention. This Court recently in *Freitas vs. Pacific-Atlantic SS Co.,* 218 F.2d 562 (CA 9th, 1955), had occasion to consider a set of facts very similar to those involved here. In that case the ship was being unloaded by an independent stevedoring firm by whom the plaintiff was employed. The hatch was partially uncovered by the stevedores, but three of the stock backs and the hatch boards covering them were left in place. The stevedore was engaged in lifting a scow flat, which it had placed in the hold, from the hold onto the main deck. This was done by attaching four cables to the scow and lifting it through the partially uncovered hatch to the main deck. As it was pulled up, the scow caught against the middle

strong back which had been left in place and pulled it from its supporting slots and the hatch boards which it had been supporting fell and one of them struck the plaintiff. The complaint charged unseaworthiness in that the locking mechanism of the strong back was defective, that the strong back was not properly locked at the time of the accident, that the strong back itself was faulty and defective and did not fit into the slot. No evidence in support of any of these claims was produced. In the *Freitas* case the strong back was lifted out of its slot by the action of the raising of the scow flat; in this case the flag was lifted out of its socket by some force, exactly what is unknown. This court in the *Freitas* case said:

> "There was no showing that if a locked strong back is in a seaworthy condition it cannot be dislodged by the force improperly and unnecessarily applied to it here * * * the law does not impose upon the shipowner the burden of an insurer nor is the owner under a duty to provide an accident-proof ship."

In *Manhat vs. U.S., supra,* the court also had the same general subject matter, i.e., a device which could be pulled up and dislodged by a person. In that case workmen in a lifeboat were injured when the lifeboat fell. The evidence was that someone had pulled the releasing lever, allowing the lifeboat to fall. The libelant in that case relied upon the fact that a workman could pull the releasing lever up, thus releasing the boat, and there were no additional safety measures either to prevent the workmen from pulling up the releasing lever or to stop the lifeboat from falling if the releasing

lever was pulled up. Justice Medina, speaking for the court, said:

> "Under no theory could a standard be considered reasonable which imposed upon the shipowner a duty to safeguard absolutely against the possibility that the handle (of the releasing lever) would be moved by one of these men."

The present facts also might be considered similar to the general facts in *Benton vs. United Towing Co.*, 120 Fed. Supp. 638 (N.D. Cal., 1954). In that case the plaintiff seaman worked on an oil barge and he discharged the oil in the barge to certain steamships by means of a large hose which was held up by lines from a boom (not dissimilar to the spout in the present case). The lines raising and lowering and moving the boom were operated by a winch which the plaintiff operated. While the plaintiff was lowering the hose, the handle of the winch must have gotten away from him and rapidly revolved, hitting him in the face. He charge unseaworthiness because the dog which acted as the brake on the winch should have been on a spring so it would release automatically when the pressure was taken off it by turning the handle. He made other charges of unseaworthiness. Judge Hamlin stated:

> "The court is unable to find any negligence on the part of the respondent, nor is the court able to find that the vessel and its gear or appliances were unseaworthy."

The court further said:

> "Properly operated, the winch was safe and a reasonable device for the operation it was called upon to do. This is demonstrated by the fact that

> Benton had safely performed the operation many times a day all during the time he worked on this barge, and that others working on the barge had similarly performed this operation many times without accident. (This is generally like the testimony in the present case.) The winch may not have been the latest and very safest device available for this type of work. However, that is not the test."

Appellant cites *Wiel and Amundsen, A/S, as Claimants of the SS ROMULUS, Appellant vs. Roy E. Potter, Appellee,* 228 F.2d 341 (9th CA). In that case this court affirmed a decree made by reason of the fact that a rod, part of the railing, was loose and gave way when it was grasped. From the facts as stated by the court, it appears that this rod was a part of the railing and purpose of the railing was to offer support to people walking on the deck. The railing was loose and couldn't be fastened because the hole through which the cotter pin should go was painted over. The trial court found the vessel was unseaworthy in this respect and certainly there was ample evidence to support it. The railing was for protection and certainly wasn't reasonably suitable for this as part of the railing was loose and could afford no protection. No connection between that case and the case here on appeal can be seen.

Likewise, *Yarbrough vs. American Mail Line,* 119 Fed. Supp. 776 (S.D. Cal) is of no assistance. The trial court stated:

> "The heel block on the No. 1 port boom was frozen in an improper position because of rust and corrosion."

Certainly that would be evidence of unseaworthiness, but that is not the situation here.

Next, appellant relies on *Williams vs. Lykes Bros. SS Co., Inc.,* 132 Fed. Supp. 732 (E.D. La.). According to the trial court the fact was:

> "Where, as here, without apparent cause, a supporting member of the deck of a vessal falls over and injures a longshoreman working in the hold of the vessel, the vessel is unseaworthy * * * ."

That was not the situation here. The flag had to be pulled out of its holder.

It is not clear to the appellee from appellant's brief whether or not the appellant is relying upon *res ipsa loquitur* or some other similar rule that the happening of an accident is sufficient proof of unseaworthiness as a matter of law. Appellant has cited *Johnson vs. United States,* 333 US 46, 68 S. Ct. 391, which was a case involving negligence and in which the court invoked *res ipsa.* Even if that case were otherwise fully applicable, it would not support a reversal in this case. As the majority stated:

> "The rule of res ipsa loquitur applied in *Jesionowski vs. Boston & Maine R. Co., supra,* means that 'the facts of the occurrence warrant the inference of negligence, *not that they compel such an inference.*'" (Emphasis supplied.)

The doctrine can be used to affirm a trial court's finding of negligence, but it cannot be used to reverse a trial court's finding of no negligence. The facts in the *Johnson* case, too, are very dissimilar from those here and the trial court found that the inference was that the accident was caused by the negligence of a fellow employee.

Lastly, the libelant relies upon the decision of this court in *Petterson vs. Alaska SS Co., Inc.,* 205 F.2d 478, Aff'd 347 US 396, 98 L. Ed. 798. Superfiicially, this case might appear contrary to the proposition that to apply *res ipsa,* exclusive control of the instrumentality is a necessary part of the proof. Such is definitely not the case. Chief Judge Denman stated the problem:

> "The question presented is whether a vessel's owner is liable for injuries received by an employee of a stevedoring company (an independent contractor) on board ship while engaged in the loading of the ship where the injuries are caused by a breaking block brought on board by the stevedoring company."

Then the court went on to say:

> "If the block was being put to a proper use in a proper manner, as found by the District Judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy.
>
> "In making this inference, we do not rely upon the tort doctrine of res ipsa loquitur, although the result is similar. Res ipsa loquitur is a doctrine of causation usually applied in cases of negligence. Here we are dealing with a species of strict liability regardless of fault (citation). It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, (citation) (it is this language which may be particularly deceiving); or that the result would not have occurred unless someone were negligent, (citation). It is only necessary to show that the condition upon which the absolute liability is determined, unseaworthiness—exists."

This court, in the *Petterson case,* was concerned with the *responsibility* for injury, not the *causation*

of injury. This court held, even though the shipowner did not have exclusive control over the block, in fact had no control as it was brought aboard and operated by the stevedore, that the shipowner was still responsible as a shipowner has a non-delegable duty to provide a seaworthy ship for longshoremen. In the *Petterson* case, causation was relatively simple; the block would not normally break unless it was unseaworthy. The cause being found to be the defective block, this court held that the ship was responsible because the block was used for loading the ship, regardless of who furnished it or who was using it at the time of the accident.

No inference of unseaworthiness is raised here simply because the accident happened (as pointed out before, even if such an inference were raised, it would not compel a reversal of the trial court). No inference is possible because the appellee was not in exclusive control of the barge or of the baker flag and, secondly, the injury was not caused by reason of an occurrence which would not have ordinarily taken place except for a defective device. As Chief Judge Denman said, res ipsa is a means of determining causation. If applicable, it raises an inference that the damage was cause by the negligence of the appellee. If the appellee was not in exclusive control of the instrument causing the damage, then there would be no inference that the device was defective as it would be equally permissible to infer that the accident was caused by a defective use of the device by someone for whose actions the appellee is not responsible. How, by any logic, could an inference be made that appellee pulled the flag out when the appellee

had no employees present and the only people on the barge were longshoremen employed by Archer-Daniels-Midland. The other reason that the inference cannot arise is because this is not the type of accident that normally would not occur unless the device was defective. The inference most readily coming to mind in this set of facts is that the injury was caused by the intentional or negligent acts of Archer-Daniels-Midland longshoremen. Somebody had to pull that flag out and the only people there were longshoremen of Archer-Daniels. The trial court did not find the specific force which pulled out the flag (Finding of Fact No. 2), but it is submitted that the most likely cause, as drawn from the record, is that some longshoreman tied a line from the boom around the flag and when the boom was raised it pulled the flag out of its socket (Tr. 31, 77, 88-89, 112).

In summary, it is submitted that the most likely conclusion to be drawn from the record is that the baker flag was pulled from its socket because a longshoreman wrapped a line from the boom around the flag and when the boom was raised it pulled the flag out. The findings of the trial court, rather than being clearly erroneous, are obviously in complete accord with the great weight of the evidence. There is no evidence to base any finding that the baker flag was unseaworthy. There can be no inference from the accident that the accident was caused by a defective device.

Respectfully submitted,

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No. 15829 16255

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PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-58

TABLE OF AUTHORITIES

No. 15829

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PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon.

TO THE HONORABLE WILLIAM E. ORR and WALTER L. POPE, Circuit Judges, and LEON R. YANKWICH, District Judge, Constituting the Court in the original hearing herein:

Appellee, Inland Navigation Company, respectfully submits that this court has substantially erred and in so doing has further extended the doctrine of unseaworthiness beyond all reasonable bounds and expectations.

THE COURT ERRED IN CONCLUDING THAT IF THE TRIAL COURT SHOULD INFER THAT THE HANGING LINES PRESENTED A POSSIBILITY OF FOULING WITH THE FLAG THE CONCLUSION OF UNSEAWORTHINESS WOULD BE UNAVOIDABLE.

This Court's finding that the trial Court could infer unseaworthiness because of the closely hanging lines went beyond all of the pleadings and contentions raised in this case.

Article IV of the original libel alleged:

> "That on said day said vessel was unseaworthy in that said signal flag was not properly secured to the vessel but was loose in its socket and positioned where it was wont to fall into the hold of the said vessel."

It is important to note that there was absolutely no allegation that any close proximity of lines hanging in the vicinity of the flag caused it to become unseaworthy. *The Appellant's sole contention was that the flag itself was unseaworthy because it was not properly secured.*

The case was tried on a pre-trial order and the libelant contended.

> "Libelant contends that the libelant was injured by reason of the unseaworthiness of Inland Navigation Company's barge in that the signal flag was not properly secured to the vessel but was loose in its socket and positioned where it was wont to fall into the hold of the vessel."

Based on the issues on which the case was tried, the trial Court held that the baker flag was recognized gear

and equipment and that it was physically impossible for the baker flag to become disengaged from its standard socket through its own action. The trial Court further held that it would have to be manually withdrawn or "some line would have to become fouled with the flag which caused it to be yanked from its socket."

The trial Court further found that the lines and gear of the stevedore hung freely in the area of the baker flag and these lines and gear were not part of the barge's gear.

The sole issue urged on the appeal by Mr. Thorson:

> "Was the barge No. 501 unseaworthy *in that the baker flag was not properly secured to the vessel but was loose in its socket and positioned where it was wont to fall into the hold of said vessel.*"

This Court in effect went beyond the issues and the sole contention of the libelant in reversing the case. The trial Court had already found that the flag in and of itself did not render the vessel unseaworthy and the finding "that some line would have to become fouled with the flag which caused it to be yanked from its socket" would be nothing more than an incidental finding and completely outside the scope of the issues raised in the pre-trial order and as Judge Yankwich stated at the time of the oral argument, this finding was unnecessary and that it was merely incidental and nothing more.

In *Peterson v. Alaska Steamship Company* (CCA 9th 1953), 205 F. (2d) 478, the injuries were apparently caused by a breaking block brought on board by the

stevedoring company. The block was brought on board the vessel whereas in this case there is absolutely no evidence that the hanging lines were even on the vessel. Also in the Peterson case the block actually broke and there the Court stated that it was a logical inference that it would not have broken unless it was defective. The defectiveness rendered the block and also the vessel unseaworthy and the block became a part of the equipment of the vessel in the unloading.

One can think of a great number of cases where some activity could, under the Court's present ruling, render every vessel unseaworthy for something that may have been going on in the vicinity of the ship. For instance if a ship was being loaded by a shoreside crane and the boom of the crane extended over the deck of the vessel and the boom struck some part of the vessel and caused some part of the vessel to fall down on a longshoreman he would be able to recover for unseaworthiness. Another instance would be where lines or ropes connected to a shoreside installation would be hanging above the deck of the vessel and these hanging lines would become fouled with some part of the rigging of the vessel and cause the rigging to collapse and fall on a longshoreman working on the deck of the vessel.

In both instances there was nothing defective or faulty about any of the equipment on the vessel itself and it only became involved because of the actions of the lines connected to the shore or the actions of the crane on the shore.

It was always thought that the appliance giving

rise to liability for unseaworthiness must be incorporated in the ship's gear or equipment. Such is not the case in the two illustrations given and certainly is not in the case presently before the Court. The trial Court merely held that there were hanging lines and gear of the stevedore in the area of the baker flag and further held that these lines and gear were not part of the barge's gear and therefore one could just as well infer that they were gear and lines on shore and certainly they did not become incorporated in the ship's gear and equipment and not incorporated in the baker flag. The Court in its opinion states:

> "In one respect this case presents a stronger one for charging the owners with unseaworthiness than was present in the Peterson case, supra, for here the unseaworthiness, if it existed, was the result of a combination of the owner's loosely placed flag with the near hanging lines attached to the boom. The flag portion of the hazard belonged to the owner, the unseaworthiness arose as much from leaving the flag in the socket near the ropes as from allowing the ropes to hang there."

This Court goes beyond the findings as the trial Judge held that even though the flag was loose in its socket that was the way it was supposed to be and that this in itself did not constitute unseaworthiness. In fact it was the looseness of the flag in the socket that the libelant charged rendered the barge unseaworthy and yet the trial Court held that that was not the case and that the looseness of the flag in the socket was proper and that the vessel was not unseaworthy.

The Court also referred to the near hanging lines "attached to the boom". There is no finding of fact to that effect.

Another illustration is a vessel navigating in a river which comes in collision with a bridge. Assume that the vessel had been navigated in accordance with proper procedures and that the fault was as a result of the negligence and inattentiveness of the operator of the drawbridge. If the mast or other rigging of the vessel had come in contact with the bridge and the rigging or mast had fallen onto the deck of the vessel and struck a seaman, could it be claimed that the seaman sustained his injuries because of the unseaworthiness of the vessel? This is a logical extension of the Court's holding in this case.

In *Crumady v. J. H. Fisser,* 358 U.S. 423, 1959 AMC 580, the topping lift on the vessel itself broke. The trial Court found that the cause of the accident to be the stevedore's improper placing of abnormal strains on the ship's gear. Again it is to be noted that the actual defect in appliance or equipment was the ship's equipment. It was stated that unseaworthiness extends not only to the vessel but to the crew *"and to appliances that are appurtenant to the ship." Mahnich v. Southern SS Co.,* 321 U.S. 96, 1944 AMC 1. As to appliances the duty of the shipowner does not end with supplying them; he must keep them in order.

In *Grillea v. U. S.,* 1956 AMC 009, 232 F. (2d) 919, it was held that the stevedores themselves could render a ship pro tanto unseaworthy and make the vessel owner liable for injuries to one of them.

In all the cases cited the acts of the stevedore made and actual appurtenance of the ship itself unseaworthy.

In none of the cases has the Court held that an appurtenance or appliance of the vessel which is seaworthy or has been found to be seaworthy merely became unseaworthy because of some outside force not actually exerted on it. The baker flag was found to be seaworthy in all regards. This Court has held that it could be inferred from the swinging lines nearby that the baker flag became unseaworthy. How could something become unseaworthy where it was performing its proper function in all regards and was in no way defective?

The Court cites *Grillea v. U. S.*, 232 F. (2d) 919, and in that case a longshoreman was hurt when he stepped on a hatch cover which he and a companion had wrongfully placed over a pad-eye.

The Second Circuit noted in discussing unseaworthiness noted:

> "It would be futile to try to draw any line between situations in which the defect is only an incident in a continuous operation, and those in which some intermediate step is to be taken as making the ship unseaworthy. Nevertheless, it is necessary to separate the two situations, even though each case must turn on its own particular circumstances. In the case at bar although the libelant and his companion * * * had been those who laid the wrong hatch cover of the pad-eye a short time before he fell, we think that enough time had elapsed to result in unseaworthiness. The cover was one of two or three that they had already put in place on the after section of the hatch; it had become a part of the platform across which the two walked to gain access to the middle section on which they were going to place another cover. The misplaced cover had therefore become as much a part of the tween deck for continued prosecution

> of the work, as though it had been permanently fixed in place."

It is to be noted that the hatch cover was itself a part of the ship's equipment as was the pad-eye and the two combined to make the unseaworthy condition. The court noted:

> "It is indeed true that to constitute unseaworthiness the defect must be in the ship's hull, gear or stowage, and even as to those she need not be perfect, but only reasonably fit for service. However, it is at times hard to say whether a defect in hull or gear that arises as a momentary step or phase in the progress of work on board should be considered as an incident in a continuous course of operation, which will fasten liability upon the owner only in case it is negligent, or as an unfitness of the ship that makes her pro tanto unseaworthy. The respondents plausibly argued, for instance, that when a strongback is dislodged by the negligence of a winchman, or of those who direct him, or when someone of the crew carelessly turns the lever that drops a boat from its davits, there is a moment however short, during which the ship is unfit and during which her unfitness causing the injury; yet on such occasion she is not deemed unseaworthy."

As the trial court held that the baker flag was not unseaworthy and that the lines and tackle did not constitute the barge's gear, it would appear that the holding of this Court is clearly erroneous under the Grillea case.

In *Rodgers v. United States Line,* 205 F. (2d) 57, 347 U.S. 984, the stevedore was using one of the ship's booms, the stevedore's landfall, the two ship's winches, a ship's run on one of the winches and the landfall runner furnished by Lavino Company. Ore was shoveled

into tubs which were then hoisted up and off the ship into roller cars on the dock and one of the tubs unexpectedly swung across the hold and struck a longshoreman. The Court noted:

> "It seems now accepted by everyone concerned that the accident was caused by the landfall runner, operated at the time by a Lavino employee rewinding on the winchdrum which forced the tub to move as it did."

The District Court denied the stevedore's motion for a new trial and this was affirmed by the Court of Appeals but the Supreme Court reversed on the basis of the Peterson case.

The longshoreman had claimed that although the runner "was originally provided by the stevedoring contractor, it was adopted by the vessel and incorporated with the vessel's loading equipment and thus became an appurtenance of the vessel with regard to which the ship had a continuing and nondelegable responsibility for its seaworthiness."

The runner became and was actually part of the unloading equipment. It therefore became an appurtenance of the vessel the same way as the defective block did in the Peterson case.

On the basis of the cases cited by the Court in its opinion it is obvious that all of those cases are distinguishable in that the activities of the stevedore and the equipment used by the stevedoring company became part and parcel of the vessel and the defectiveness of the equipment rendered the vessel unseaworthy. Such is not the case presently before the Court as the

baker flag was in all regards seaworthy and the only thing that was nearby were some hanging lines and it is clear from the evidence that these lines were not part or parcel of the equipment of the vessel and had no relation to the baker flag and its use.

It is therefore respectfully submitted that the Court reinstated the findings of the Trial Court so as to prevent a further unjustified extension of the doctrine of seaworthiness.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON,
By KENNETH E. ROBERTS.

No. 16253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. WYLIE, Trustee in Bankruptcy of the Estate of CLAIR V. WARD, Bankrupt,

Appellant,

vs.

CLAIR V. WARD,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLEE.

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TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED

GENERAL ORDER

STATUTES

TEXTBOOKS

No. 16253

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BRIEF OF APPELLEE.

Statement of the Case and Facts.

The principal question involved in this appeal is the sufficiency of the evidence to support the findings of the Referee.

The trial court may take into consideration the interest of a witness in the result of an action in determining the credibility of such witness. Therefore, it becomes important not to overlook the fact that while the record, on its face, shows that the specifications of objections to the bankrupt's discharge were filed and this appeal is prosecuted in the name of the trustee in bankruptcy, the real party in interest and the prosecutor thereof is the U. S. Rubber Company, which we shall also refer to as

"U. S. Rubber." Indeed, the Referee so considered these objections early in these proceedings when he stated [R. p. 146]: "What I have in mind here is that while these objections were filed by the trustee, they are in reality the objections of the U. S. Rubber Company."

The record of the Clerk of this Honorable Court will also, no doubt, show that the U. S. Rubber Company, and not the estate of the bankrupt, is bearing the costs of this appeal. The record of the trial discloses the extreme interest of the U. S. Rubber Company and of its counsel and the total lack of interest of any other creditor. [See argument of counsel for U. S. Rubber with Referee over Referee's decision beginning at R. p. 414.] In reality, as observed by the Referee, this is a proceeding prosecuted by the U. S. Rubber, and at its expense, and it should have the frankness and courage to come out in the open and say so.

The Bankrupt Was Closely Connected With U. S. Rubber Company for Thirty Years.

Mr. Ward, the bankrupt, was a customer and had an agency agreement with U. S. Rubber for a period of thirty years, dating back to 1923. [R. pp. 108-109, 234.] The relationship was very close and U. S. Rubber knew every detail of Ward's business and of his financial condition without resort to financial statements. [See testimony of Ward beginning at R. p. 239.]

Ward's business was something more than the average run of service stations, and sold tires in large volume to

large users of tires, such as trucking companies, the County of Los Angeles, and others. It was a 12 pump, 12 drive way station. [R. p. 440.]

Ward was located in Alhambra, California, and had this large place of business, with 20 to 25 employees [R. p. 106], including three girl bookkeepers. He sold gas, oil, tires and other auto accessories [R. p. 109], and shortly prior to 1950, he sold radios and televisions, which resulted in his distressed financial condition in the early part of 1950. [R. p. 241.] Mr. Ward supervised the keeping of the books, but he did not actually make the entries. [R. p. 107.]

In the early part of 1951, Mr. Swartz [R. p. 244], the U. S. Rubber Company's comptroller came out from New York and brought several officials of the company along with him, including Mr. Bowers [R. pp. 248-249], an auditor, who took over complete charge of Ward's bookkeeping and set up a change in Ward's bookkeeping system. Bowers had full authority to direct the entire accounting system. We shall subsequently show that it was the system of bookkeeping set up by U. S. Rubber Company's auditor Mr. Bowers [R. p. 276], of which U. S. Rubber now complains.

Mr. Ward bought tires from U. S. Rubber and resold them to his customers on retail, wholesale and commercial levels. [R. p. 109.] He had received credit from U. S. Rubber since 1923. [R. p. 109.]

Ward was one of U. S. Rubber's largest dealers in Los Angeles County. He sold in excess of $10,000,000.00 of

U. S. Rubber's merchandise over the period of years and in excess of $700,000.00 of said company's merchandise [R. p. 240], in the last 24 months.

Prior to 1950 Mr. Ward took on additional merchandise, such as radios, televisions, etc., and when the television market dropped in or about 1950 [R. p. 514], Mr. Ward became financially involved to such an extent that the head officers and auditors came out here from U. S. Rubber's head offices in New York and spent one full week in Ward's office *in the examination of all books and records and familiarizing themselves with Ward's business.* [R. pp. 241-249.] They learned then from said investigation that Ward was insolvent. [R. p. 246.] Mr. Bowers, who was field auditor for U. S. Rubber, was one of these officers. [R. pp. 241-264.] Mr. Bowers not only made a complete audit of Ward's records at the time, but had supervision of Ward's records from February, 1950, for a period of about 18 months, and thereafter made occasional visits "as he chose to come in and check with us, and all phases of the operation of the business was fully discussed with him at all times."

The financial statements on many occasions, including some of those objected to, were prepared under the supervision of Mr. Bowers, who was in Ward's office making up these statements. [R. p. 253; see also Bankrupt's Ex. 8.] The first six of the financial statements offered in evidence were in the handwriting of Mr. Bowers, who, as before stated, was U. S. Rubber's officer. In other words, U. S. Rubber was making Ward's statements for delivery to itself. [See also R. 319-322.]

Mr. Ward factored certain accounts receivable with Pasadena Finance Company, Atlas Factors, and People's Finance. [R. p. 691; also Ward's testimony generally and at p. 157.] The accounts were sold with a reserve being held against the sale. [R. pp. 159-165.]

Growing out of the audit and investigation made by U. S. Rubber, as above related, Ward gave U. S. Rubber $30,000.00 cash and a series of notes for $2,000.00 each, which covered the entire amount Ward then owed U. S. Rubber. These notes were executed *before any of the financial statements herein complained of were given,* and the same were payable one each month thereafter for a period of 40 months. Mr. Ward made all payments on these notes each month as they became due, and also kept the account for merchandise purchased and sold each month paid up-to-date. [R. p. 274.] It should be observed that the extension notes were given and accepted before any financial statements were issued.

And, in May, 1953, and prior to May 19, 1953, the day on which counsel for the trustee states the U. S. Rubber attached Ward's place of business, Ward delivered to U. S. Rubber checks to pay the May, 1953, current running account in full, and U. S. Rubber had these checks, which were good and could have been cashed, in their possession and did not reject them or return them to Ward until 10 days after the attachment. [R. p. 274.] We attempted to show the reason for this vicious and unwarranted action upon the part of U. S. Rubber, as well as the motive for the objection to the discharge and would have done so,

had we not been stopped by the Referee. [R. pp. 277-279.] It has always been the bankrupt's contention that no money was due U. S. Rubber from Ward when the attachment was levied; that this wrongful and malicious action on the part of U. S. Rubber forced Ward into an assignment proceeding and subsequently into involuntary bankruptcy.

These are reasons why U. S. Rubber prefers to press its objections in the name of the trustee. It has come to realize, also, that unless it can crush and suppress the effectiveness of the bankrupt as a tire merchant, it has created in this territory a most formable competitor. We believe this shows an interest which affects the credibility of its employees as witnesses.

Bankrupt's Individual Assets as Distinguished From Partnership Assets.

Mention is made of certain individual assets of Mr. Ward listed in the financial statements here involved, but it is important to remember that no individual property of Mr. Ward was ever listed in any of these financial statements here complained of such as his home or the Seal Beach lot, but instead Mr. Ward's individual property was listed as being of a value of $51,200.70. The U. S. Rubber Company, on the first six financial statements prepared by its own field auditor who had complete access to all of Mr. Ward's records, listed this same figure in the statements which were admittedly prepared in Bower's own handwriting. [See Bankrupt's Ex. 8.]

Items of Credit Extended After 1950 by U. S. Rubber to the Bankrupt.

It is important to remember that the numerous notes which Mr. Ward executed in 1950 in favor of U. S. Rubber were all executed before the financial statements complained of. Therefore, that extension of credit was given prior to the financial statements and said statements could have in no way influenced the extension of this credit by notes. It will be noted from a reading of the evidence heretofore cited that officers of U. S. Rubber told Ward that he was insolvent at the time the notes were executed. The only credit extended during the time the financial statements were being received by U. S. Rubber was monthly sales from consigned merchandise. [R. p. 169.] These accounts were paid monthly.

Harry Stout, who was the credit manager for U. S. Rubber from January, 1951, to the time of his testimony, was the third witness called. Mr. Stout testified [R. pp. 166-186] that he normally received the monthly statements from the bankrupt between the 5th and the 10th of the following month. When he received the statement [R. p. 169], he analyzed it to see whether or not Ward *was making progress* and the statement itself was then forwarded to the New York office with Mr. Stout's recommendation. The witness testified that after he received this statement, he continued to extend credit to Mr. Ward, but it appears this credit was upon a "consigned basis." It should be noted that this testimony does not disclose that this credit was extended upon the strength

of or in reliance upon the financial statement. U. S. Rubber counted its merchandise on the 20th of each month. [R. p. 170.]

With reference to the consigned merchandise, Mr. Stout testified [R. p. 170]:

> "The tires remained at his premises at all times. He was able to sell any or all of them at his own discretion. At or about the 20th of each month an inventory would be taken."

Other Evidence.

Not only did all the "Big Brass" of U. S. Rubber come here with their auditors and spend a week at Mr. Ward's office in 1950, but they left their field auditor in charge to set Ward's books up to his own liking. The company's auditor made Ward's financial statements in his own handwriting for six months and directed Ward's bookkeepers how and what to do. Ward testified that he gave them full and complete information with reference to his financial condition and made all of his papers, books and records available to them. He told Mr. Swartz that the home was in joint tenancy with his wife. [R. p. 243.]

The Specifications of Objections Involved in This Appeal.

Although the referee ruled adversely to the contention of U. S. Rubber upon each specification of objection, the appeal is only upon specifications of objections numbers 1, 3, 4, 5, 11d and 12. We prefer to deal with each of these separately rather than in "shotgun" fashion as appellant has done, although much of the same evidence applies to all objections.

ARGUMENT.

The Problems Here Involved Require Expert Accounting of the Highest Order.

Fortunately for the bankrupt, the Referee in this case is an able accountant in his own right, and although the U. S. Rubber Company's contingent were able to confuse him upon a few of the issues for awhile, he finally, after hearing further evidence, saw the light and ruled in favor of the bankrupt upon all counts. As a matter of fact, counsel for the trustee is an able accountant, and the bankrupt because of his thirty years' experience with U. S. Rubber and their manner of concealing the profits by paying certain bonuses, was able to dig out certain facts from the records. Otherwise, he would have been hopelessly lost in the confusion of figures.

Rules Which Govern on an Appeal.

In a very recent case, *In re Inman,* 157 Fed. Supp. 506, decided December 9, 1957, the Court, in sustaining a referee's finding upon an objection to the bankrupt's discharge, says (p. 508):

> ". . . The authority hereinbefore cited hold that on a petition to review the Court cannot be compelled to search the record for error, and this Court will not undertake to do so."

And in paragraph No. 6 of this opinion, page 510, the Court says:

> "General Order in Bankruptcy No. 47, 11 U. S. C. A. following section 53, provides that the district judge '. . . shall accept his (the Referee's findings of fact unless clearly erroneous . . .,' and the rule is well established that 'When the findings of a

referee are based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses and observed their demeanor, great weight attaches to his conclusions . . . the district judge . . . should not disturb his findings unless they are manifestly unsupported by the evidence.' *In re Musgrave,* D. C. N. D. Va. 1939, 27 F. Supp. 341, 343. See *In re Ouellette,* D. C. Me., 1951, 98 F. Supp. 941; *In re Roar,* D. C. E. D. Ky., 1939, 28 F. Supp. 515; 2 Collier on Bankruptcy, Sec. 38.28 (14th ed. 1956).

"After reading the entire record this Court has found it impossible to conclude that the Referee was clearly erroneous in any of his findings of fact or that he erred in his conclusions of law. Such are, therefore, adopted as the findings and conclusions of this Court, the petition for review is denied, and the order of the Referee is affirmed."

To the same effect are:

In re Florsheim (S. D. C. D.), 24 Fed. Supp. 991;

Humphreys Gold Corp. v. Lewis (9 Cir.), 90 F. 2d 896;

Century Indemnity Co. v. Nelson (9 Cir.), 90 F. 2d 644;

Inland Power & Light Co. v. Greiger (9 Cir.), 91 F. 2d 811.

General Order No. 47 of the Supreme Court says that the district judge ". . . shall accept his (the Referee's) findings of fact unless clearly erroneous . . .," and the courts of this and other jurisdictions have constantly refused to interfere with the referee's findings where

same are based upon conflicting evidence involving questions of credibility, etc., and as pointed out, the Court will not search the record in order to try to find error.

And counsel's pointing out the most favorable evidence in favor of the reviewing party will not suffice where the Referee's findings, holding to the contrary, are under attack. We mention this because counsel for the appellant here has made reference to only a very small part of the testimony received in this case. In addition to the oral testimony received over a three year period, involving hearings and rehearings of all these issues, there were a mass of documents received in evidence to which very slight reference has been made.

Keeping in mind that Ward had an agency agreement with U. S. Rubber for 30 years, is further evidence that the company was as familiar with Word's business, his liabilities and his assets as Ward was himself, and the Referee properly concluded that U. S. Rubber did not rely upon these statements in extending credit, but rather upon its own knowledge based upon years of experience, and based upon the information furnished the Rubber Company's accountant, and the Company's monthly inventory.

As shown by Mr. Stout's testimony quoted above, U. S. Rubber took a count and inventory of the tires and merchandise on the 20th of each month. Every time Ward sold a tire the company knew about it very soon afterwards.

The Referee points out [R. p. 170] during Mr. Stout's testimony that he did not do anything new affirmatively every month, to which Stout agrees and says: "We honored his orders for additional merchandise to be shipped

into the consignment, to replenish the tires or goods that were sold."

There appears to have been $50,463.00 consigned inventory on or about February 28, 1953.

At [R. p. 171], the following questions were asked of Mr. Stout and the following answers given:

> "Q. Now, would you have continued that merchandise with Mr. Ward if you had not received this statement? A. When it was due I would have asked him for the statement. It was our practice to get one, whether or not I might have continued it. I might have for a few days, but certainly it was on the basis of his sending us his financial information that we continued to go along with him."

It will be noted that the witness does not say that he would have discontinued the credit arrangement if he had failed to receive the monthly statement. At [R. p. 172], it was stipulated that Mr. Stout's testimony would be the same with reference to the other monthly statements and that he would testify he did rely upon the other statements "to the extent that he has testified here." He was very evasive and did not testify that he relied upon the financial statement, and under this type of unsatisfactory testimony, the Referee was right under all of the evidence in finding there was no reliance.

When Mr. Stout said that they honored Ward's orders for additional merchandise to be shipped into the consignment, to replenish the tires or goods that were sold, he did not say that this was done upon the reliance on the financial statement.

The Referee's remark [at R. p. 178] is important in connection with this evidence. [See also R. pp. 252-263, where exhibits received.]

Then, of course, there was the testimony of the expert C.P.A., Hugh W. Friedman, produced by U. S. Rubber [beginning at R. p. 187], with reference to the $51,200.70 figure, covering Mr. Ward's individual assets, but nothing was produced which was very convincing to the Referee. The Referee was not interested in nice bookkeeping, but rather in knowing whether or not there were intentional false entries. [R. p. 219.]

SPECIFICATION OF OBJECTION No. 1.

Referee's Finding No. V in Findings on Specification of Objection No. 1.

Because of the importance of this particular finding in relation to all the above referred to evidence, as it pertains to the review upon the first five specifications of objections, we quote it in full:

> "Finds that the bankrupt, Clair V. Ward, under different names and entities, from time to time, had an agency franchise agreement and did business on a credit basis with the United States Rubber Company for a period of approximately thirty years immediately preceding the filing of bankruptcy herein; that certain of its auditors and officers were in Los Angeles from New York City in September or October of 1950, when a credit extension arrangement was agreed to, and prior to agreeing to any credit extension and further credit arrangement, said auditors, officers and officials of said United States Rubber Company remained at the place of business of the bankrupt, for a period of seven days or more, where

a complete check and audit was made of all of the books and records and financial affairs of the partnership of which the bankrupt was then a partner, as well as the said bankrupt's personal assets; that the officials of said United States Rubber Company were given full and complete co-operation of the bankrupt, and access to all records of the bankrupt, both personal or partnership, in making their check and audit.

"That Pressley M. Bowers, who was then the field auditor of the United States Rubber Company, was one of the above officials referred to; that he started work on the books of the bankrupt in October, 1950, and remained there on a permanent basis until August 1, 1951, and thereafter would return from two to five days each month until February, 1952; that the said Bowers set up a new set of books and a new bookkeeping system for the bankrupt and gave instructions to the bankrupt's bookkeepers as to how entries should be made and as to what information the financial statement mentioned in paragraph 3 of the 'First Objection' should contain; that the said Bowers, as United States Rubber Company's field auditor, made, in his own handwriting, several such financial statements for the bankrupt, and that the bankrupt's bookkeeper prepared the financial statements referred to in said paragraph 3 under the direction of said Bowers.

"Finds that the United States Rubber Company took a monthly inventory of the bankrupt's tires during the period of time in question, and was thoroughly familiar with the nature and extent of the bankrupt's business and of his financial condition and activities,

and that said United States Rubber Company did not rely upon said financial statements in extending credit to the bankrupt at any time during the period from October, 1950, to the date of bankruptcy, and further finds that none of the financial statements mentioned in paragraph 3 of the 'First Objection' were intentionally false. The Court further finds that this finding, herein numbered '5', shall be considered as a part of the findings upon Specification of Objections of numbered 1, 2, 3, 4 and 5 as amended, without the necessity of repetition."

The evidence is clear that Ward's individual and partnership records were produced and his financial condition was thoroughly discussed with U. S. Rubber and U. S. Rubber knew as much about it as Ward did himself. Ward told Swarts that the home was in joint tenancy. [R. p. 243.] It was not misled or deceived in any way, nor was there any attempt to mislead or deceive it. The evidence cited shows that U. S. Rubber was not looking to Ward's home as a means of payment. [See R. pp. 336-340; also pp. 260-261.]

Third Specification of Objection.

This specification involves the sale of the Seal Beach lot which was individually owned by Mr. Ward.

He did sell this lot in September, 1952, for $3,250.00 cash plus a transfer to Ward of other real property of the approximate value of $4,350.00; that the cash which the bankrupt received from the sale of said real property was first deposited in his personal bank account, where it rightfully belonged. It was then later deposited in the partnership account and an entry was made upon the

partnership books giving Mr. Ward credit for advancing the partnership this sum of money. Mr. Ward, after the sale of the Seal Beach lot, did not make an adjustment of the $51,200.70 figure because he felt he was no richer or poorer after selling the Seal Beach property; he still had a lot, and he had advanced to the partnership his personal funds, and the partnership was charged therewith, and owed him this amount. [R. p. 134—see also beginning p. 130.] Mr. Ward testifed that he informed Mr. Stout of this sale and obviously there was no intent to mislead or deceive anyone. [R. p. 273.] In view of the Referee's findings has it not occurred to counsel for appellant that the trial court believed Ward's testimony?

In this connection, see Mr. Friedman's testimony [R. pp. 190-191] which shows entry in Ward's partnership books giving him credit for this loan to the partnership. Friedman admits there was such an entry in the financial statement, Trustee's Exhibit 2.

(See Appendix No. 1, Quoting and Citing Ward's Testimony, With Reference to Exhibits.)

Also, testimony of other witnesses, including Esther Buhler. [R. p. 319.]

A bankrupt is not adjudged honest or dishonest by the nicety of his bookkeeping entries according to the highest standards of bookkeeping, as the Referee pointed out in his remarks to Mr. Triester that he (Triester) was making no distinction between a false statement and an incorrect statement. [R. p. 219.]

The Finding No. V of the first specification of objecting is made a part of findings on specification of objection No. 3 and this, together with Finding No. III [R. pp. 64-65] in findings on specification of objection No. 3 are clearly supported by the evidence.

Specifications of Objections 4 and 5.

Findings of fact upon specification of objection Nos. 4 and 5 are in a way consolidated and will be presented together.

First: Finding No. V [R. pp. 61-63] of the first specification of objection is applicable to specifications of objection Nos. 4 and 5 and certain findings of specification No. 5 are applicable to specifications of objection No. 4.

Finding No. III of specifications of objection No. 5 is applicable to specification No. 4, and the facts are set forth in Appendix No. 2 hereto attached. [See also R. pp. 588-672.]

These findings tell a rather complete story and are supported by the evidence of Mr. Ward and Garibaldi, upon the subject as well as the following documentary evidence. See Bankrupt's Exhibits 21 to 27, inclusive.

It is significant to note that it was Mr. Bowers, the field auditor for U. S. Rubber, who set up the first Garibaldi entry in the financial statement, and U. S. Rubber most certainly knew what it was all about. The company was constantly after Mr. Ward to get such orders and commitments from important customers and it was good business to do so for it kept them from ordering their tires elsewhere. Also, if, as Mr. Stout said, U. S. Rubber counted Mr. Ward's tires on hand each month, the company certainly knew whether such a large order of tires had been delivered.

The Referee's findings above mentioned refutes the statement of appellant that neither of the Garibaldi nor Navajo Freight Lines orders were fictitious or that all of them had been factored. Again this finding is supported by Mr. Ward's testimony and by documentary

evidence. As a matter of fact, the transcript will disclose that counsel for appellant admitted in open court that the first Garibaldi order was not factored. It seems rather strange that he would now make such a statement and try to brand Mr. Ward as a crook and a liar when there is a total lack of evidence to support such unfounded assertions. In doing so counsel certainly is not expressing the views of the trustee, but rather the feelings of U. S. Rubber. It is obvious that the Referee believed Ward. It is true the Referee made some critical remarks about Ward's testimony before he got the whole story, including the Exhibits. But it is evident that the Referee followed Ward's testimony rather than Friedman's theory.

It was Mr. Ward, himself, in an affidavit filed in support of or in resistance to one of the many motions which brought to light the fact that the account of the County of Los Angeles had been paid and that his bookkeeping department had inadvertently failed to make an entry thereon. Ward discovered this when checking for other information and he immediately disclosed it to the Court.

We are not here contending that there were no errors. There are always many bookkeeping errors in a large business of this kind. What we do contend is that there were no intentional errors or fraudulent misrepresentations.

The evidence shows, without conflict, that Ward had a large business and over a period of time did in excess of $10,000.000.00 with U. S. Rubber. [R. p. 240.] That in the last 24 months his business with said Rubber Company was in excess of $700,000.00. Mr. Ward said [R. p. 245] that in 1950 he owed U. S. Rubber $110,000.00. He agreed to liquidate assets and reduce this amount to

$80,000.00 and then execute 40 serial notes for $2,000.00 each, payable one every 30 days, starting March 25, 1951.

Mr. Swartz of U. S. Rubber told Ward at the time that he was insolvent, so U. S. Rubber was fully aware of Ward's financial condition, with or without financial statements.

Mr. Ward frequently discussed with Mr. Stout his financial condition. He told Stout about the sale of the Seal Beach property in September, 1952 Mr. Stout admits the last time he talked with Ward about the Seal Beach property was in the fall of 1952. [R. p. 384.]

Mr. Ward did not personally make out the financial statements nor did he sign them. It was a mechanical operation that was done by the bookkeeping department. Not only were these statements furnished monthly, but a report of the sales progress was made by telephone every ten days. Mr. Ward did not see each statement before it was mailed.

In the recent case of *Household Finance Corporation v. Groscost,* 230 F. 2d 608, the Referee's findings that the Finance Company did not rely upon the financial statement was upheld by both the District Court and the Court of Appeals. In this case the Finance Company was found to have dealt with the bankrupts over a period of five years and the Court said that the Finance Company knew, or should have known, the financial condition of the bankrupts.

Here, in this case, U. S. Rubber had done an extensive business with Mr. Ward for a period of thirty years, running into many millions. Not only that, but U. S. Rubber's best auditors were turned loose in Mr. Ward's place of business and made a complete check of everything.

They had access to all records, both personal and partnership. Thereafter, according to Stout, they counted the tires each month and took a complete inventory. Mr. Ward gave them a telephone report every ten days as to the amount of sales. They did not have to have a financial statement to know what was going on, and if they did, their own auditor helped prepare those from Mr. Ward's own records.

Again we say that they knew as much about Ward's business as he did himself.

Fraudulent Intent Is an Essential Element and Must Be Established Before a Discharge Can Be Denied Under the Above Specifications.

Construction of Discharge Provisions.

"Statutory provisions regulating discharges are remedial in their nature. They should be construed liberally with the purpose of carrying into effect the legislative intent, and the grounds in opposition enumerated in Sec. 14c should not be extended by construction."

Collier on Bankruptcy, Vol. 1, 14th Ed., p. 1254.

Intent: Meaning of "False."

"It has been held that an intent to defraud is essential; the word 'false' means more than erroneous or untrue and imports an intention to deceive, and a materially false statement in writing must have been knowingly or intentionally untrue to bar a discharge. Intention to deceive is always material as an element of proof, and, by the weight of authority, such intent is an essential element. It must be shown that the bankrupt's alleged false statement in writing was

either knowingly false or made so recklessly as to warrant a finding that he acted fraudulently."

Collier on Bankruptcy, Vol. 1, 14th Ed., p. 1351.

See also:

International Harvester Co. of America v. Carlson, 217 Fed. 736;

In re Stafford, 226 Fed. 127;

Baash-Ross Tool Co. v. Stephens (9th Cir.), 73 F. 2d 902.

It is said in the case of *In re Boomgaarden,* 17 F. 2d 149 at 150:

"It must be kept in mind that the burden is upon the objecting creditor to prove that the bankrupt obtained money or property on credit upon a materially false statement, that the statement was in writing, *that it was made to the creditor for the purpose of obtaining credit,* that it was known to be false by the bankrupt, and that the creditor relied upon it when he parted with his property. Matter of Wolff, Bankrupt (D. C.), 7 Am. Bankr. Rep. (N. S.) 365, 11 F. (2d) 293; Bank of Monroe v. Gleason (C. C. A.), 7 Am. Bankr. Rep. (N. S.) 56, 9 F. 2d 520." (Emphasis ours.)

and in the case of *In re Sugarman,* 3 Fed. Supp. 502 at 504, the Court said:

"Statement will bar discharge if (a) property was obtained on credit thereby, (b) the statement was materially false, and (c) was made for the purpose of obtaining such property on credit. *Morimura, Arai & Co. v. Taback,* 279 U. S. 24, 49 S. Ct. 212, 73 L. Ed. 586."

In sustaining the fact that a business man has a right to rely upon his bookkeeper, the Court in the case of *In re Collins,* 157 Fed. 120, held, quoting from the syllabus:

> "A materially false statement in writing made by a bankrupt for the purpose of obtaining property on credit, to debar him from the right to a discharge under Bankr. Act. July 1, 1898, c. 541, Sec. 14b (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, Sec. 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026) must have been either knowingly false or made so recklessly as to warrant a finding that he acted fraudulently. Such a statement of assets and liabilities, made by a merchant from his books and believed by him to be correct, will not warrant a denial of his discharge in bankruptcy, although it was in fact materially erroneous, by reason of the failure of his bookkeeper, through illness, to enter on the books certain liabilities which existed at the time the statement was made, and which were in consequence omitted therefrom."

In re Hatch, 43 F. 2d 378;

Tibbs v. Cater, 191 F. 2d 957;

In re Johnson, 215 Fed. 748;

In re Morgan, 267 Fed. 959;

International Shoe Co. v. Kahn, 22 F. 2d 131;

In re Parnell Lbr. Co., 107 Fed. Supp. 794.

See Dave Garibaldi's testimony beginning [R. p. 703]. See testimony beginning [R. p. 883].

See also Bankrupt's Exhibits 24, 25, 26 and 27.

See second page of Trustee's Exhibit 15 one-half way down page, opposite date of "12-8" shows Garibaldi Bros.

marked "paid." Another item of Garibaldi on Trustee's Exhibit 15 marked "paid."

The total of Garibaldi accounts marked "paid" are:

$4,697.20
2,226.04
7,045.82

$13,969.06

SPECIFICATIONS OF OBJECTION No. 11d.

Important Evidence Received at the Trial, Upon Which the Referee Relied, Is Found to Be Missing From the Printed Record.

Although appellant contends that the evidence received by the Referee compels a different finding, yet through inadvertence or otherwise, considerable important evidence, upon which the Referee relied in support of his findings, and more particularly upon the findings with reference to specifications of objections No. 11d and 12 is missing from the printed record.

The bankrupt has been financially unable to furnish his counsel with a copy of the transcript of the evidence taken at the trial, and during the course of the proceedings counsel has been compelled to secure information therefrom in much the same way that Lazarus secured his bread. We did our begging, however, from a gentleman not so elaborately dressed, but very kind and considerate.—The Referee permitted us to make examination of the original transcript. We have no immediate access to the transcript, but we do know that attorney, James B. Ogg, testified in behalf of the bankrupt to the effect that the bankrupt came to him for advice as to what he should do

with reference to the mail of the bankrupt, after the attachment of May 19th, and Mr. Ogg testified that he advised Mr. Ward, that in his opinion the only way the accounts receivable could be attached would be by serving a writ upon the debtor, and advised Mr. Ward to have his mail transferred to General Delivery. Mr. Ogg testified that he immediately informed Glenn Traugher, Chief Deputy of the Civil Department of the Sheriff's office that he had so advised Mr. Ward. This testimony appears at pages 4 to 11 in the volume of the transcript containing Ogg's testimony.

Testimony of Witnesses Also Produced by the Bankrupt Upon Specification of Objection No. 12 Is Missing From the Printed Record.

The bankrupt called as witnesses Richard Ward, John Vernon and others.

The testimony of these witnesses does not appear in the printed record although it is explanatory of certain property, including batteries which the objector contended were missing from the Ward inventory.

Not having the transcript of the evidence before us, we are now very suspicious of what additional important evidence may have been omitted from the record at the request of counsel for U. S. Rubber. We will not have sufficient time to examine into this before filing our brief.

Unless all such evidence is supplied in a printed record to this Honorable Court by appellant, we shall insist upon the dismissal of the appeal and take such other steps as we may deem advisable to protect the interest of the bankrupt.

We shall proceed with our argument upon the remaining specifications of error as though the record was complete.

The facts briefly stated are:

On May 19, 1953, at 11:00 A. M., the place of business of the bankrupt, known as C. V. Ward's Tire Sales at 2601 West Mission Road, Alhambra, California, was attached by U. S. Rubber Co., and a Sheriff's keeper was placed in custody. The bank accounts in the Bank of America at Alhambra, California, and the Motor Vehicles, were attached.

The instructions to the Sheriff did not direct the attachment of the accounts receivable, of the U. S. mail (if such was subject to attachment) [see testimony of Mr. Amio *re* mail at R. p. 1100] or of any property not in existence or available *at the time of the original levy.* The instructions make no mention of the operation of the bankrupt's business.

Mr. Ward testified that on May 19th, when the mail came in, his office processed it, the checks were put in the cash drawer and the Sheriff took possession of them. [R. p. 1062.] The following day he received the letter from Pasadena Finance Company which is marked herein as Bankrupt's Exhibit 52 which required the checks on assigned accounts mailed to them. Mr. Ward took this letter and showed it to the Sheriff's keeper, and the keeper stated to him, in effect [R. pp. 1063-1076] that he could not take anything that Mr. Ward had on his person or in his pocket, and told Ward if he met the mailman before he delivered the mail at the place of business and took it, it would not be under attachment and the Sheriff could

do nothing about it; that Ward would have a right to keep it.

Mr. Ward did not rest his right to so receive the mail upon what the keeper had told him, but sought and obtained the advice of his attorney, James B. Ogg, whom he had employed to represent him in this case.

Mr. Ogg advised Mr. Ward that in his opinion the only way the accounts receivable could be attached would be by serving a writ upon the debtor, and advised Mr. Ward to have his mail transferred to General Delivery. The attorney also informed Glenn Traughber, Chief Deputy of the Civil Department of the Sheriff's office, that he had so advised Mr. Ward.

Mr. Ward thereupon changed his mail to General Delivery and turned the checks upon the factored accounts over to the Pasadena Finance Company and the checks in payment of the free accounts were cashed by Mr. Ward and used by him to buy gas and oil for the service station and the money which he received from the operation of the service station (sale of gas and oil) was turned over to the Sheriff until such time as the gas and oil end of the service station was released outright to Mr. Ward.

The United States Mail Addressed to the Bankrupt Was Not Under Attachment, nor Could It Properly Be Attached. A Levy of Attachment Made by an Officer on Personal Property Which He Does Not See or Have in His Possession Is Void. Attachment Statutes Must Be Strictly Followed or No Rights Will Be Acquired Thereunder.

First.—Section 542, C. C. P., requires "instructions in writing, signed by the plaintiff or his attorney of record, *and containing a description of the property,*" (emphasis ours) be delivered to the Sheriff or other officer named in said Section.

No mention of the United States mail addressed to the bankrupt, checks, nor a description thereof was mentioned in the written instructions which are in evidence.

Second.—Since the remedy of attachment derives its existence entirely from the legislative enactment, it has the scope, and only the scope, which the Legislature has chosen to accord it. The rule of the law of attachment is to the effect that the provisions of the statute conferring the remedy must be strictly followed, or no rights will be acquired thereunder.

Ruskin v. Cheney, 25 Cal. App. 2d 753 at p. 755, Par. No. 1, and cases cited thereunder;

Alpha Stores, Ltd. v. You Bet Mining Co., 18 Cal. App. 2d 252, at 258.

Third.—"A levy of attachment made by an officer on personal property which he does not see or have in his possession is void."

Los Angeles Soap Company v. Bossen, 122 Cal. App. 237 at 241, Par. No. 3;

Herron v. Hughes, et al., 25 Cal. 555;

Taffts v. Manlove, 14 Cal. 47.

The case of *Los Angeles Soap Co. v. Bossen* above cited points out at page 242 that Section 542, Code of Civil Procedure provides: "Personal property capable of manual delivery, must be attached by taking it into custody."

Subdivision 6 of Section 542 provides the method, and the only method, to be used in the attachment of accounts receivable. *At the time the attachment herein was levied the checks which were later received through the mail by Mr. Ward were in the form of an account receivable.*

The Court, in the *Estate of Troy,* 1 Cal. App. 2d 732, said, paragraph 4, page 735:

> "When the realty was converted into cash this became personal property which was not in the hands of the executor when the attachment was levied. As an attachment applies only to debts existing at the time of the levy (*Norris v. Burgoyne,* 4 Cal. 409), the lien of the attachment could not cover after-acquired property. This has been the accepted rule in this state for so many years that we need not consider authorities from other jurisdictions which, while not holding directly to the contrary, might support the argument for a different rule."

The above, we submit, supports our contention that these checks which came through the mail after May 19th were in the form of accounts receivable at the time of the levy of the attachment, and could only be legally attached pursuant to subdivision 6 of Section 542, Code of Civil Procedure, and the attachment could not reach the checks, themselves.

The attaching creditor could acquire no greater rights than Mr. Ward had in the factored accounts—*Santens v. Los Angeles Finance Co.,* 91 Cal. App. 2d 197 at 201, paragraph No. 2, and Ward was clearly within his rights in turning these checks over to Pasadena Finance Co.

Subdivision 8 of Section 542 has reference to checks and drafts, etc., which *are in the possession of and payable to the defendant at the time of the levy of the attachment.* The testimony is to the effect that Mr. Ward placed in the cash drawer all checks, drafts, and moneys received on the day of attachment and that the Sheriff received the same.

It is obvious that moneys or checks coming into the hands of the bankrupt after the levy of the attachment on May 19th were not properly covered in the instructions to attach or under the attachment. The Sheriff, as we have already seen from the above cited cases, can only attach what he sees and takes into his possession.

If it was ever the intent of U. S. Rubber Co. to attach the accounts receivable, and we doubt very much if such was its intent, then it should have strictly complied with the provisions of subdivision 6 of Section 542, Code of Civil Procedure.

We therefore believe that the advice given by attorney Ogg was right; that the bankrupt believed it to be a

correct statement of the law and followed it, and in doing so he had no intent, fraudulent or otherwise, to hinder or delay any creditor.

Furthermore, the U. S. Rubber Co. benefited by the transaction, since all the money received from the free accounts was used by Mr. Ward to purchase gas and oil, and upon the sale of the gas and oil the money was turned over to the Sheriff's keeper for the benefit of U. S. Rubber Co. Thus, U. S. Rubber Co. acquired in this manner money which it could not have rightfully acquired under its instructions and attachment. This, it appears to us, clearly demonstrates no intent, or even the remotest thought upon the part of Mr. Ward to keep these funds away from the attaching creditor. He had these checks cashed and in use in the custody of the Sheriff before the Sheriff could possibly have cleared the checks.

The Sheriff, Even Had He Been so Instructed, Had No Right to Seize the Bankrupt's Mail Under the Writ of Attachment.

There is nothing in the attachment statutes, either express or implied, authorizing the Sheriff to take possession of mail of the attached defendant. We have searched for a California case upon this subject and have found none. There is, however, an early New York case cited in Code of Civil Procedure, West's Codes Annotated. It is *Hergman, et al. v. Dettleback, et al.,* 11 How. 46, where the Court in holding that the books and records of a partnership might be held by the Sheriff, also held that letters and correspondence are not among the papers authorized to be seized. The Court in this case said:

> "But the power of the sheriff, under the attachment, is limited to the right to *take* them only; and having

taken, he was required to *safely keep them.* (2 R. S. 3, Sec. 7.)

"The sheriff had not power or authority beyond that, except as directed by the officer who granted the warrant. (Vide, Sec. 8.)

"When, therefore, the deputy sheriff assumed to examine such books and papers, take copies of the business letters, look into the correspondence of the partners, or do any other act in relation to them, than simply to *keep them safely,* subject to the direction of the judge who allowed the process, he was guilty of an unpardonable abuse of his powers, and of the process of the court.

"It was usurping the exercise of a discretion which the statute reserved to the judge alone, and reserved to him, too, for reasons of the most obvious character. To tolerate such a proceeding would lead to the most gross abuses, and enable the process of attachment to be used for inquisitorial purposes, which, in its consequences, would be in derogation of the spirit of the Bill of Rights.

"It is evident, also, from the affidavits, that many papers, not contemplated by the statute, have been seized in this proceeding under color of the attachment.

"The statute provides that certain books and papers may be taken into possession under the process. (Vide, Sections 7, 8.)

"Letters and correspondence are not among those authorized to be taken.

"As the whole proceeding on the part of the deputy, in examining the books and papers, is grossly irregu-

lar, an order must be made, that the regular books of account of the firm, and its notes, policies of insurance, and all other securities and vouchers, be safely kept by the deputy sheriff, under lock and key, without power on the part of such deputy, or any other person, except the defendants, to look into or examine the same, except under the special order of the court, to be made on notice to the defendants.

"The defendants and their counsel to be at liberty, at all reasonable hours, to examine, or take copies or abstracts from them, in the presence of the deputy.

"All other papers, of every name and description, taken by such deputy, and all translations, or copies of such translations, if any, of the books, letters, vouchers or papers, must be delivered up forthwith to the defendants' attorneys; and to insure the same, such delivery must be made under an affidavit—to be made by such deputy, by the plaintiffs, and their attorneys and counsel—that, at the time of such delivery, such copies embrace every translation, or copy of such translation, or copy of such original which the deponent knows of, or believes, or has any reason to believe, exists; and the plaintiffs and their attorneys, agents and counsellors, are hereby restrained from in any way using such original books and papers, or using or disclosing the contents of such copies in any manner whatsoever, except by special order of the court.

"This order must be complied with forthwith, and is to be entered with costs of motion."

If U. S. Rubber Could Not or Did Not Attach All of the Bankrupt's Property, the Bankrupt Was Entitled to Make Reasonable Use of His Property Not Under Attachment, Without Being Subject to the Charge of "Hindering and Delaying Creditors."

No duty is imposed upon a defendant, when he has been served with a writ of attachment, to go out and gather up any part of his unattached property and surrender it to the sheriff, and no case can be found where such a duty is so imposed. Suppose, for example, that Mr. Ward had maintained a bank account in some other branch of the Bank of America other than those mentioned in the plaintiff's instructions. Could he be properly criticized for not making it known to the Sheriff, and could he be said to have hindered and delayed the attaching creditor because he may have drawn such money out of the bank and used it for some proper business purpose? The answer obviously must be "No."

Ward Believed and Followed the Advice of His Attorney, and Since He Was Advised and Believed That the Attachment Did Not Cover the Checks Coming Through the Mail, There Was No Intent Upon His Part to Hinder or Delay the Attaching Creditor.

As we have heretofore pointed out, a defendant who has had certain of his property attached has a right to use his unattached property for proper business purposes, without subjecting himself to the charge of hindering and delaying the attaching creditor. Clients usually go to their counsel and seek advice, and pay for it, for the purpose of following it and keeping out of trouble. We submit that there is every reason to believe that Mr. Ward

sought this advice in good faith, believed his counsel when he was advised that the mail could not be attached, and if he believed it was not under attachment, then there is no basis for holding that he did anything with intent to hinder and delay under the facts in this case.

It must be remembered that it was the Sheriff's keeper who first suggested to Mr. Ward that he get the mail before it reached the place of business, and had he been determined to take it regardless of the legal consequences, he did not need the advice of the attorney whom he was paying to guide him aright. He could do the improper thing without the advice of counsel.

Is it any wonder that the bankrupt, an ordinary layman, needed legal advice to determine whether he was free to deal with the checks coming through the mail when this same question bothers the Court and counsel?

As said by the Court, *In re Wyche,* 51 Fed. Supp. 825, at 828:

> "I have been unable to find the authority for seizing and selling a bond of this series, which is U.S. Savings Bond, Series 'E'. Since both lawyers and the Court itself are unable to cite authority for seizing and selling bonds of this character, it must follow that a layman cannot be charged with bad faith in concluding that a bond that is not transferable is exempt. Even though the bonds are assets and should have been surrendered, it would not be a sufficient offense to deny a bankrupt a discharge, if he honestly thought the bonds were exempt and not an asset. He stated that he thought that since

his wife's name was written on the bonds they were payable to her. The conduct of the bankrupt in this matter is not reprehensible and he should not be denied a discharge."

Had the bankrupt used the money which he received through the mail for some fraudulent, questionable or unbusinesslike purpose, possibly an intent to hinder and delay might be inferred from his acts, but when he uses it in his business where it promptly flows into the Sheriff's keeper's hands, a contrary conclusion must follow. Such conclusion is buttressed by the fact that he fully and fairly disclosed the facts to his counsel, sought the advice of counsel and acted thereon in a fair and upright manner and in a way entirely free from an evil or corrupt mind.

In Order to Prevail Under This Specification of Objection, There Must Be More Than a Mere Intent to Hinder and Delay a Creditor.

The bankrupt to be denied a discharge under this subsection of the Bankruptcy Act, must have within the specified time, *transferred, removed, destroyed,* or *concealed* (or permitted these things to be done) his property "with intent to hinder, delay, or defraud his creditors."

Section 1(7) of the Bankruptcy Act defines "conceal," and subdivision 30 of Section 1 of the Act defines "Transfer." We observe no definition of the words "removed" or "destroyed," but I think we can readily agree that no property was destroyed. It was all preserved. We can likewise agree that it was not concealed, for it was done openly, avowedly and with the knowledge of the Chief Civil Deputy Sheriff [Tr. July 13, p. 4, line 15, to p. 5, line 4], and of the keeper. [Tr. June 12, p. 13, line 22, to p. 14, line 26.] Furthermore, the money received from

the free checks coming through the mail was used to purchase gas and oil and an accounting kept thereof and the Sheriff took possession of the funds received from the sale of this gas and oil. [Tr. June 12, p. 78, lines 7-11; p. 79, lines 18-20.]

Volume 1, Collier on Bankruptcy, 14th Ed., page 414 says:

> " 'Conceal,' according to Sec. 1 (7), *supra,* Par. 1.07, 'shall include secrete, falsify, and mutilate.' This definition obviously does not attempt to be exclusive. Hence the interpretation heretofore given to 'conceal' is necessary to discover its meaning. The word 'conceal' is construed to mean to hide or withdraw from observation, to carry or keep from sight, to prevent discovery of, or to withhold knowledge of the existence, ownership, or location of property. Thus, where a partner refused to pay firm creditors or to divulge where he was keeping firm funds, this constituted a firm act of bankruptcy. Some older decisions held it to be a concealment where the debtor procured an attachment to issue upon a fictitious debt in order to prevent a creditor from attaching his property. *But where a debtor converted his property into cash intending in good faith to invest it later in tangible property for business purposes, this did not constitute a concealment which could be treated as an act of bankruptcy.* (Emphasis ours.) . . . And proof of concealment requires something more than a mere failure to volunteer information to creditors."

See also *Continental Bank & Trust Co. of New York v. Winter,* 153 F. 2d 397 at 399, paragraphs 3-5. "Proof of concealment, however, requires something more than a mere failure to volunteer information to creditors."

Collier likewise defines "Transfer" and "Removal" and says that "Removal" "signifies an actual or physical change in the position or locality of property of the debtor resulting in a depletion of the debtor's estate."

1 Collier on Bankruptcy, p. 415.

See:

In re McGraw, 254 Fed. Supp. 442.

Mr. Ward did not transfer any of this property. He received the cash on the free checks which were made payable to him, and he purchased gas and oil with it and the attaching creditor received the benefits thereof.

We Respectfully Contend, Notwithstanding the Expression of the Trial Court to the Contrary, That the Act of the Bankrupt Here Complained of Must Have Been Done With Fraudulent Intent Before His Discharge Can Be Denied.

Volume 1, Collier on Bankruptcy, 14th Ed., page 1360, paragraph 14, 47, under the heading "Intent" says:

> "In order to justify a refusal of discharge under Sec. 14c(4), it must be shown that the acts complained of were done with an intent to hinder, delay, or defraud his creditors. This intent, moreover, must be an actual fraudulent intent as distinguished from constructive intent."

and cites a long line of cases in support of the statement.

The 9th Circuit Court in the case of *Harris v. Baker,* 86 F. 2d 937 at 937-938, said:

> "Intent to defraud is the basic ingredient of the bankrupt's acts. Good faith must emphasize his act in dealing with his property."

And, again, the Court says:

> "It is the evil mind against which the bar is placed so as to guard against repetition, as well as give creditors a hold on the future activities of the bankrupt."

This was an objection under section 14c(4) Bankruptcy Act.

In re Wolf, 165 F. 2d 707 at 710, the Court says, "To bar the bankrupt's discharge there must be an actual fraudulent intent (Collier on Bankruptcy (14th Ed) page 1360)." This case involved a discharge under Section 14c(4) of the Bankruptcy Act.

Judge Kaufman of the New York District Court, in the case of *In re Nemerov,* 134 Fed. Supp. 678, in passing upon a similar objection says:

> "It is clear that there must be actual intent to defraud; constructive intent is not sufficient to bar discharge. This view is buttressed by a comparison of the discharge provisions of the Bankruptcy Act with the provisions of that Act relating to setting aside conveyances which are deemed fraudulent as to creditors. The conveyance section states that a transfer is fraudulent 'if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, *without regard to his actual intent.*' The provision relating to discharge contains no such specific and conclusive language. It is, therefore, reasonable to assume that if Congress had intended to foreclose proof of intent in dealing with fraudulent transfers which bar discharge, it would have used more specific language."

Suffice it to say that there are many cases of similar import.

The Cases Cited and Heretofore Relied Upon by Counsel for the Objector Are Mostly Cases Involving an Act of Bankruptcy, Instead of an Objection to a Discharge.

A careful reading of *In re Hughes,* 184 Fed. Supp. 872, heretofore cited by counsel for the objector, demonstrates this point, notwithstanding counsel's intimation that this case involved a discharge.

In the case of *In re Perlmutter,* 256 Fed. Supp. 860, cited by opposing counsel, there was involved a *consummated* fraudulent withdrawal of money by the bankrupt, who told an unbelievable story with reference to paying off a gambling debt.

In re Lampros, Inc., 18 F. 2d 633, was another case dealing with a transfer of property in an involuntary bankruptcy proceeding, as distinguished from an objection to a discharge.

Just why counsel cites *Duggins v. Heffran,* 128 F. 2d 546, is hard to understand. The writer of this brief was the Referee before whom this case was tried. There was an abundance of evidence showing a fraudulent intent. [See the findings.]

Duggins had deeded to his then secretary-sweetheart some property, without consideration, and clearly with fraudulent intent to hinder and delay his creditors.

I held that this property was conveyed without consideration and with intent to hinder, delay and defraud his creditors, and held it to be an asset of the estate. The Court of Appeal reversed this ruling solely upon the ground that the action was barred by the statutes of limitations in 115 F. 2d 519. However, the Court in 128

F. 2d 546 upheld my order denying the bankrupt's discharge.

A careful reading of other cases cited by counsel for the objector will reveal they are not in point.

Advice of Counsel as a Defense.

The case of *Fisk v. Commissioner of Internal Revenue,* 203 F. 2d 358, involves the question of whether a taxpayer can be penalized for filing a belated return when acting upon the advice of counsel. The Court at page 359 says:

> "As pointed out by the Second Circuit in *Haywood Lumber & Mining Co., supra* (178 F. 2d 771), 'To impute to the taxpayer the mistakes of his consultant would be to penalize him for consulting an expert; for if he must take the benefit of his counsel's or accountant's advice cum onere, then he must be held to a standard of care which is not his own and one which, in most cases, would be far higher than that exacted of a layman.' "

Then the Court further says at page 360:

> "We adhere to the rule stated in *Haywood Lumber & Mining Co., supra,* that as a matter of law reasonable cause was shown in this case. This rule, we hold, applies to the filing of tax returns as well as to reliance upon technical advice in complicated legal matters. We think this conclusion is in accord with the principle declared by the Supreme Court that the penalties under the revenue laws were designed to be imposed upon conduct 'which is intentional, or knowing, or voluntary, as distinguished from accidental.' *United States v. Murdock,* 290 U. S. 389, 394, 54 S. Ct. 223, 225, 78 L. Ed. 381. 'It is not the purpose

of the law to penalize . . . innocent errors made despite the exercise of reasonable care.' *Spies v. United States,* 317 U. S. 492, 496, 63 S. Ct. 364, 367, 87 L. Ed. 418."

In the case of *Dilworth v. Boothe,* 69 F. 2d 621 at 623, the Court held that acts done upon the advice of counsel was a defense where property had been omitted from bankruptcy scheduled.

To the same effect are:

Thompson v. Eck, 149 F. 2d 631 at 633;
Merritt v. Peters (9 Cir.), 28 F. 2d 679.

The Court points out in this case that the client has a right to act upon the advice of counsel upon questions of law, as distinguished from questions of fact, which he should know, where he fully and fairly states the facts to his attorney and acts upon advice as to matters of law.

Here, Mr. Ward was given advice upon a question of law, and followed the advice given.

There are many other cases of similar import, but we do not deem it necessary to burden the Court with further citations.

Summary.

Under the discussion of the lack of authority of the Sheriff to receive the mail, we neglected to point out that when Mr. Amio testified on June 12th that he had no ruling whereby he could open the mail [R. pp. 1100-1101] said: "We had no control over the mail," Mr. Ward is not required to do any acts for the Sheriff which the Sheriff was without authority to do, although Mr. Ward in effect did so by cashing the free checks and putting the money into the business where the Sheriff did get it.

SPECIFICATION OF OBJECTION No. 12.

The Referee found that each and every allegation contained in the twelfth objection, as amended, is untrue, and found that it is not true that the bankrupt failed to explain satisfactorily a loss of assets and a deficiency of assets to meet his liabilities.

There were volumes of testimony taken over days and weeks of time upon this particular objection. [See beginning R. p. 438.] As a matter of fact, the Referee considered all material evidence theretofore offered, upon this objection. This is another reason why none of the evidence should have been omitted from the Record. At first he ruled against the bankrupt, and then again. But finally the bankrupt presented affidavits and photostat copies of invoices and records which could not be disputed and the Referee re-opened the objection for further evidence. [R. p. 813.] The bankrupt was able to produce evidence and records which convinced the Referee that he was wrong in the first instance.

This was not the only objection which the Referee reopened for further hearing. He twice permitted the objector to re-open and amend his specifications of objection upon a number of the counts, but each time, after further hearing, refused to change his prior ruling.

The fact that the Referee did grant further hearings to both sides shows his extreme fairness and his desire to arrive at the correct answer.

It is the duty of appellant here to point out from the entire record wherein the Referee was wrong in his ruling, and if there is evidence to sustain his findings, the Court, under General Order 47, is required to sustain the findings. The mere citation of one bit of evidence is no in-

dication that the Referee accepted it, when there is other evidence to the contrary.

Certainly, the appellant cannot, by simply referring to small bits of evidence, establish the fact that the Referee's findings are "clearly erroneous."

Mr. Ward's testimony, found throughout the record, both oral and documentary, was believed by the Referee and accepted as a satisfactory explanation. The same is true with reference to the bankrupt's explanation of the tires, batteries and other items of equipment.

It is equally clear that Mr. Friedman's testimony and theories were rejected by the Referee, and rightly so. No doubt the fact that Mr. Friedman changed his figures and counts of tires and batteries several times (each time Mr. Ward would confront him with different documents and facts) caused the Court to come to the conclusion that Mr. Friedman was prejudiced in favor of his employer, U. S. Rubber, and that he did not know what he was talking about.

We do not believe the Referee was about to deprive an honest and upright business man of his discharge upon such wavering testimony.

The Objection Made Under Specification No. 12 Is Easy to Charge and Hard to Disprove.

Especially is this true where there has been a large volume of business by the bankrupt, followed by an operation by the Sheriff and then by an assignee.

The average businessman would have been completely lost if faced with a charge of this kind, for where there is a large volume of business and a large number of employees running it, there are always errors in bookkeeping

and shortages in inventory even under the most honest operations.

Fortunately, Mr. Ward had worked long enough with U. S. Rubber to understand their secret ways of arriving at a profit. During the trial, I believe it was the Referee who suggested that it was a peculiar business that could sell a tire at a price under cost and still make a profit.

Ward knew that the figures which Mr. Friedman kept coming up with were incorrect and he kept digging into the records and finding the correct answers. This took time and a diligent effort.

The bulk of the testimony directly upon this Specification came from Ward and Friedman. Ward prevailed. Friedman's explanations simply were not acceptable to the Referee who knows accounting himself. The Referee was more concerned with honesty than with the requirements of the fine details of accounting.

When counsel for the appellant cites bits of Friedman's testimony in support of his charge of error on the part of the Referee, he overlooks the fact that the Referee has the same right to accept the bankrupt's testimony, if believed, as he does that of an auditor hired and paid by U. S. Rubber.

The very fact that Mr. Friedman tried to make a big issue out of the Navajo Frieght Lines transaction, where it ordered 36 tires of a certain kind and later decided it wanted 30 tires of another kind and canceled the first order and Mr. Ward reversed the first sale so as to balance his books, would cause anyone to wonder why a C.P.A. would try to make an issue of such a transaction without first going to someone who knew and could explain a very simple transaction. [See Record beginning at p. 1206.] (Also App. 2.)

When Mr. Ward changed his factoring arrangement on the Garibaldi account from Pasadena Finance to Atlas Factors and took Atlas Fatcors' money over and paid Pasadena Finance off, just as one would if he changed the loan on his home from Mutual Savings to Federal Savings, Mr. Friedman picked this up and called it a double factoring, apparently without making inquiries from someone who would know and could explain a simple business transaction.

This is the type of a witness counsel for appellant asks this Honorable Court to follow, notwithstanding the fact that the Referee who saw him on the witness stand day after day over a three-year period, could not and did not accept his theories and explanations.

This Issue Was First Approached From the Dollar and Cents Point of View and Later by Count of Articles.

It is apparent from the record of this proceeding that prior to March 1, 1955, this issue was approached by the accounting angle with emphasis upon the dollar and cents point of view rather than the number of units unaccounted for.

Therefore, when the question of the number of missing units arose on March 1, 1955 (in the battery department), we overlooked the fact that four of the batteries in question were purchased prior to February 28, 1953, as we clearly demonstrated later by producing the invoice. Mr. Ward at the time did not have before him the information regarding the sale of four additional batteries as subsequently shown in Ward's affidavit in support of motion to re-open the case for further hearing.

Furthermore, Mr. Ward did not have before him or know the information subsequently given by his son and

James Samp in an affidavit form in support of the motion to re-open which accounts for 10 additional batteries. This accounts for fourteen of the missing batteries, and also shows that four more of the batteries alleged to be missing were erroneously counted as purchases after March 1, 1953, when in fact they were purchased prior to February 28, 1953, and were in the February 28th inventory. The sales by the assignee of batteries in the sum of $36.00 also shows sales of other batteries without giving the number. This is but a few of the accounted for items, but explains why the Court re-opened this count for further hearing after ruling adversely to the bankrupt.

When you have been proceeding from the dollar point of view and suddenly jump to an item by item count, it leads to confusion and, if the witness has not previously refreshed his memory from records where he has been doing a large volume of business, it is easy to become confused.

This demonstrates how difficult it is to account for every little article in the shop. Mr. Friedman also made concessions in his previous testimony and 92 of the 96 new batteries were finally accounted for.

In this connection, the case of *In re Horwitz,* 92 F. 2d 632, is very much in point. The Court at page 633 says:

> "The proof upon the second specification is of no more satisfactory character. This objection is grounded upon the fact that there is a discrepancy of some $19,000 between a financial statement made by the bankrupt in May, 1935, and his statement of assets and liabilities contained in his schedules, some four and a half months later. In other words, there is no direct evidence that the debtor has concealed

any of his property, or that the apparent deficiency is one in fact or, if real, was caused by any illegal act upon his part.

"Approximately $5,500 of this difference is due, according to the undisputed evidence, to uncollectible accounts receivable or bad debts. The evidence indicates rather clearly that the business of jobbing dresses is sharply controlled by the seasons; that during the period in question bad weather interfered with sales; that in order to dispose of his merchandise the bankrupt was forced to sell at a loss; that his creditors were pushing him; that he gave them post-dated checks and took substantial losses on sales, due to the unseasonable weather, in order to procure funds to meet the checks as they matured. He testified that his purchases totaled $48,000 in 1935, and his sales $52,000, but that his expenses and losses were approximately $21,000.

"If this testimony be true, the debtor should not be denied his discharge because of an alleged unexplained discrepancy. It is argued that the circumstances are such as to destroy his credibility, but the referee, before whom he testified and who had the opportunity of observing him upon the witness stand, concluded that he had made a reasonable explanation and that the specifications should not be sustained, saying that no adequate or substantial proof had been submitted.

"We have examined the evidence and we are of the opinion that his conclusion was correct, and, there being an absence of clear proof sustained the objections, that the discharge should be granted. Accord-

ingly, the order of the District Court is reversed, with directions to proceed in accord with this decision."

There is a total lack of evidence—not even a suspicion—that Mr. Ward took or concealed any of the property of the bankrupt estate. From the evidence we suspicion no one. But, also, from the evidence, it could be argued with as much force that the assignee or the Sheriff's force or both were responsible for the shortage. They were the last in possession.

It must be remembered that Mr. Ward was very much in business when U. S. Rubber clamped down with an attachment. Mr. Ward was not expecting or contemplating such action. He had given U. S. Rubber good checks for its May, 1953, payments and had no reason to believe that U. S. Rubber would not accept them. If Ward had been given any forewarning of this attachment action, then there might be some reason to suspect him of removal of some of the items. But he was running a business which he thought and believed would succeed. He had been able to meet all his obligations with U. S. Rubber and his other creditors. Certainly he was not going to steal from himself.

Therefore, objector's contentions just do not make good sense.

Answer to Appellant's Brief Under "A" of Argument. Page 5 Brief.

We have not heretofore made particular reference to appellant's brief. We see very little therein that really needs a reply in face of the volume of evidence which fully supports the finding of the Court. We have made reference by page to most of this evidence. It would

be too burdensome and an unending task to cite each answer or document which supports the Referee's finding.—The Referee expressed his views [R. pp. 405-1225] which covered the first five specifications of objections. The Referee again emphasizes the difference [R. p. 1226] between an incorrect and a false statement. He also calls attention to the fact [R. p. 1226] that this system of bookkeeping was suggested, if not put into effect, by U. S. Rubber; that whatever errors appeared [R. p. 1227] were not intentional errors. Certainly no burden was placed upon the objector not contemplated by the Bankruptcy Act. The trial court followed the evidence which he believed.

The effect of the warning, to which counsel refers, the Referee gave Ward [R. pp. 478, 479, 484] was not to volunteer information [see R. p. 484], where the Referee says:

> "You are so filled with your side of the case that you are taking advantage of every opportunity to try to get it across."

This could not be construed as an indication of disbelief of the witness.

The Referee Was Misled by Counsel for U. S. Rubber for a While Into Believing That Mr. Ward Had Factored the First Sale to Garibaldi [R. p. 759] and Was at First Led to Believe That There Had Been a Double Factoring as Distinguished From a Change in the Factoring Account, From One Financing Company to Another.

Again our Appendix No. 2 explains this situation. And while the court expressed itself in a certain way upon the Seal Beach property [R. pp. 760-761] and upon the battery evidence [R. p. 808] it later received evidence which

influenced and justified the findings subsequently made. [See cross-examination beginning R. p. 858.]

The bankrupt was denied an opportunity to explain. [R. pp. 870-871.]

Subsequently, however, when the court fully understood the true facts, its findings were entirely different. [See Examination beginning R. p. 691; and particularly pp. 694-696.]

It is one thing for counsel for U. S. Rubber to make the assertion that the bankrupt lied and quite another to point out such evidence supported by a finding of the court. I have used the expression "counsel for the U. S. Rubber" advisedly, for I know that any counsel representing the true views of the trustee in bankruptcy would make no such statement.

Because the bankrupt said [R. p. 646] that the Garibaldi account was the only one of its kind that he *recalled* counsel for appellant thinks he has the bankrupt branded as a liar (see p. 8, Br.), because the bankrupt later happened to recall other accounts [R. p. 895] of a kindred nature.

Answer to Appellant's Argument "B," Page 8 Brief.

It appears that we have already made a rather complete answer to the contention here made. The brief of appellant at bottom of page 9 says:

"The Referee concluded that U. S. Rubber had not relied upon the item of falsity," with respect to bankrupt's home. As we read these findings, the Referee did not find this to be false, although he did find a lack of reliance thereon. We have heretofore pointed out that the bankrupt told Swartz that the home was held in joint tenancy, and this testimony is not denied.

We again submit that the bankrupt bore any and all burdens of proof required of him under the law.

The Referee refused to find that the financial statements in question were intentionally false. He found to the contrary. He also found U. S. Rubber did not rely thereon, the statements of counsel (Br. p. 11) to the contrary notwithstanding.

The statement of the Referee [R. p. 410]; and quoted (App. Br. p. 11) was made early in the proceedings. From the court's findings, it is obvious that it came to a different conclusion, just as it did on other issues after hearing other evidence.

The effect of the court's Finding No. III [R. pp. 64-65] is to the legal effect that while the statement there mentioned was incorrect, it was not intentionally false. We have heretofore called attention to evidence showing Ward told Stout of the sale of the Seal Beach property in September, 1952, and Stout admitted he had not talked with Ward about this property since the fall of 1952. This is a strong indication that Stout knew of the sale.

We have also heretofore pointed out that the Referee distinguished between incorrect methods of account and false statements.

Mr. Freidman seemed to be unable to distinguish between improper methods of accounting, according to his ideas, and an intentional false statement.

Again (p. 13, Br.) counsel for appellant makes a misleading statement in respect to quoting the finding, through his failure to quote the contents of the entire finding. Neither does counsel distinguish between a statement of the court made in the early stages of the trial and the finding of the court which was finally adopted by the court in its ultimate decision.

The last paragraph of Finding III [R. p. 65] could very well have been, and doubtless was, made upon the strength of Ward's testimony to the effect that he had informed Stout in September, 1952, that the Seal Beach lot had been sold, coupled with Stout's testimony that he had not discussed this property with Ward since the fall of 1952. The statement which the trial court made during the trial (App. Br. p. 13) was made before its attention had been called to the above testimony which the Referee, at first, had overlooked.

The trial court was not bound to follow the inference of Stout, and it was only an inference, that he relied upon the financial statements in extending credit, and especially when there were convincing facts and circumstances showing that he did not so rely. One of such circumstances being the requirement that the inventory be counted on the 20th of each and every month, another, the fact that Swartz knew Ward was insolvent back in 1951. U. S. Rubber was interested in what could be accomplished by future sales and not what Ward's worth might be. They had already told him that he was insolvent.

The Court's Findings Upon Objections Nos. 4 and 5 Are Fully Supported by the Evidence.

We have already explained the situation covered in these findings in Appendix 2, by disclosing that *there was no factoring of the first Garibaldi invoice,* and there was no double factoring but rather a transfer of an account from one factor to another.

Mr. Treister, himself, admitted during the trial that the first Garibaldi invoice was not factored.

The evidence shows that it was Mr. Bowers, U. S. Rubber's auditor, who directed how the first Garibaldi invoice should be set up on the financial statements after he was informed as to the nature of the transaction. [See Find. No. III, R. pp. 68-69.]

Ward's testimony is to the same effect as shown in Appendix No. 2, as to the Navajo Freight Lines invoices, and shows that U. S. Rubber was fully advised thereof. The court's findings are supported by the testimony of Ward, Garibaldi, Adrainse, and by documentary evidence.

There was an unintentional error in the account of Los Angeles County which was explained by Mr. Ward and whose testimony was adopted in the court's findings. [R. p. 70.]

There Was No Error in the Findings of the Referee Upon Specifications of Objection No. 12, or in the Court's Order Reopening the Case for the Taking of Further Evidence.

There is a great volume of testimony, both oral and documentary, for and against the question of the ability of the bankrupt to account for losses of assets. There is sufficient conflict in this testimony that the decision of the court thereon should not be disturbed. It is purely a question of which evidence the court accepted as true. It finally accepted the explanation of the bankrupt as correct rather than the theories of Mr. Friedman, which were based upon his ideas of ideal methods of accounting. We have covered this question quite thoroughly in our brief before we began commenting upon the remarks made in appellant's brief.

The Right of the Referee to Reopen the Hearing for the Taking of Further Evidence Was Purely Within the Discretion of the Referee.

Furthermore, the motion made on April 7, 1955 (App. Br. p. 21), was supported by affidavits and documentary evidence. [R. p. 813.] Such affidavits and documentary evidence are not before this court in the record, and, therefore, this Honorable Court is in no position to pass upon the correctness of the court's ruling in the absence of this evidence.

The Court Properly Ruled That the Bankrupt Did Not Remove or Conceal His Assets With Intent to Hinder or Delay His Creditors.

This question has been covered fully hereinabove and we shall not repeat.

As to the court's comments (App. Br. p. 23) we only need to call attention to the court's memorandum of opinion [R. p. 50] which was rendered subsequent to the remarks cited in appellant's brief, and to the court's findings made much later. [R. p. 71.]

The word "preference" is used by appellant at bottom of page 23 of its brief, but counsel has cleverly avoided the use of the words "voidable preference." Obviously, the finance company held a valid assignment of these accounts and were entitled to the proceeds thereof.

All moneys received through the mail were used for one of two purposes. 1st—The finance company got the checks to pay the accounts which had been assigned to it. 2nd—Ward purchased gas and oil with the balance, sold the gas and oil from such sale for the benefit of the attaching creditor.

No one was injured in any way and there was no intent to injure, hinder or delay any creditor within the purview of the law.

The Referee spent days upon days and weeks upon weeks listening to all the evidence over a period of three years. He granted rehearings to both sides and patiently listened to further evidence from both sides. He personally saw, and participated in the examination of the witnesses. He studied the volumes of documentary evidence and arrived at his decision.

There is ample evidence, produced by the bankrupt himself, to sustain the findings. This should eliminate appellant's contention that the Referee placed the entire burden of proof upon the trustee. We respectfully submit that the findings and orders of the Referee should be sustained.

Respectfuly submitted,

UTLEY & HOUCK,

By ERNEST R. UTLEY,

Attorneys for the Bankrupt.

APPENDIX NO. 1.

Bankrupt's Case.

Clair V. Ward was called to the stand in his own behalf, and testified [R. pp. 234-239] that he had done business with the U. S. Rubber Company since 1923; [R. pp. 105-166]; that the nature of his business was the sale of automobile tires over the San Gabriel Valley, and that the volume of business that he did with the U. S. Rubber Company over the period of time was in excess of $10,000.000.00; [R. p. 240]; that in the last twenty-four months his business with said Rubber Company was in excess of $700,000.00. That during the entire period he gave them monthly financial statements. The partnership business was organized in the latter part of 1947, but not actually set up until 1948. That his financial position first became involved in the first part of 1950 due to the collapse of the television market at that time. [R. pp. 241 and 514.] In the first part of 1951 (January or February) the comptroller of U. S. Rubber Company visited Ward. His name was Mr. Swartz and he came here from New York. He brought with him Charley Ostrom, the co-ordinator of sales and finance to check my account because they felt that it was in a financial situation that they wanted to make an appraisal of it. I did not know in advance that they were coming, and when they arrived, they came to my office and asked for an opportunity to make a thorough examination into my assets and liabilities and all of my books and records, and they remained in my office for six or seven days, personally examining all of the available books and records which were all there in my office at the time. [R. p. 242.] "I made every record available to them and I instructed my employees to make any and all records available to

them at that time." During that period of time Ward had discussions with Swartz, and Ward told him his home was in joint tenancy. [R. p. 243.]

After several conferences with Swartz and Ostrom [R. p. 244], it was decided that I was to dispose of all my personal assets, with the exception *of my home and furniture,* in an orderly way and not to cause a distress sale, and to *put the money into the business.* The Seal Beach property was very definitely discussed. "I agreed with Mr. Swartz that I would liquidate the Seal Beach property at the earliest opportunity, without causing a distress sale, and realize the maximum amount from it." Mr. Swartz insisted upon it. He demanded that I dispose of all liquid assets and use the money as working capital.

At that time, I owed U. S. Rubber Company approximately $110,000.00. [R. p. 245.]

> "We had our last conference at the Ambassador Hotel on a Sunday morning, Mr. Swartz, Mr. Ostrom, Mr. Walsh, who was the Pacific Coast manager of U. S. Rubber Company, and Mr. Harry Oliver, who is now general sales manager of the company at New York, was the district manager in Los Angeles at the time. The committee agreed that if I would agree to dispose of all the liquid assets that I had, with the exception of my home, and would pay off my account down to a net amount of $80,000, that they would extend to me 40 serial notes of $2,000 each, with interest at six per cent, payable one every 30 days, starting March 25, 1951. I agreed to that program and told them I would liquidate the Seal Beach property at the earliest opportunity. I immediately listed it with two brokers in Seal Beach. I did not have an adequate offer on it until Sep-

tember of the following year, which I felt was a reasonable price in relationship to the value of the property. I exchanged it then for another piece of property and received $3,250 net in exchange." [R. p. 245.]

Ward's insolvent condition was mentioned by Swartz.

"Mr. Swartz called my attention to the fact that I was actually insolvent at the time and they were very doubtful as to whether I could go forward and liquidate my business or carry on my business, and that whether they should liquidate it at that time or work forward with me on it was a decision that they had to make after a thorough examination of all of the books and records, attacking the background apparently of my ability to carry on for the company. Apparently they decided that I could carry on and I had an opportunity to go forward and pay off my indebtedness, not only to the United States Rubber Company but to all the other creditors." [R. p. 246.]

"He said I was insolvent at that time and it was questionable in his mind whether I could make the grade or not. He said, 'I made a projection of a one-year period, showing the total sales and cost of sales, the expense of sales, and the cash position in each 30-day period that we would be operating in.' He subsequently sent me a copy of the projection after his return to New York." [R. p. 247.]

The document in my hand is a projection of the sales and expenses and the cost of sales for the period of the year 1951.

> "Immediately upon the receipt of that schedule or immediately upon the time that Mr. Swartz left to go back to New York, he placed Mr. Buck Bowers in charge of my office and he was representing the U. S. Rubber Company for a period of some 18 months, from that time on." [R. p. 247.]

Mr. Bowers was to supervise my operations. He was a field auditor for the U. S. Rubber Company. Mr. Bowers is the good looking gentleman with glasses, sitting in the court room. The projection above mentioned was offered in evidence as Bankrupt's Exhibit 1.

At about this time there was a complete change in my system of bookkeeping, set up by Buck Bowers. [R. p. 248.]

> "Mr. Bowers had full authority to direct the entire accounting system and used that authority in collaboration with my auditor, should I say, that he instructed my auditor." [R. p. 249.]

My auditor, Mr. Ross, died in August, 1952, I believe.

Bowers came into my office in the later part of February, 1951, immediately after Swartz and Ostrom returned to New York.

The financial statement of March 31, 1951, was the first one, and it was made by Buck Bowers. [R. p. 253.] Bowers also made out the April 30, 1951 statement. Bowers had full access to my books and records in preparing these statements. The May and June, 1951, statements are also in the handwriting of Bowers. Mr. Bowers gave me this folder where I kept my copies of the monthly statements. I had in my files in my office copies of substantially all financial statements which I had given.

Mr. Bowers was in charge of my books in early March, 1951, for 18 months.

The financial statements in the handwriting of Mr. Bowers are Bankrupt's Exhibit 8. [R. pp. 263-264.]

The Seal Beach property was sold in September, 1952, and the $3,250.00 cash received was first deposited in my personal bank account and then transferred to the partnership account. [R. p. 265.]

I transferred $1,000 on September 8, 1952, and $2,250 on September 17, 1952. (See Bankrupts Exhibits 9-10-11.)

I discussed with Mr. Harry Stout, the credit manager, in September, 1952, the fact that I had sold the Seal Beach property and had used the money to pay bills currently on that date. [R. p. 273.]

> "I did. Each month, when I reported to Mr. Stout as to the financial condition of my business and I carried my check into his office on the 15th day of each month, we sat down and had a discussion about the operation of the business and we discussed everything in detail that transpired the month before, in order that he might be thoroughly acquainted with all of the operations." [R. p. 274.]

Ward did not personally make out the monthly statements and did not sign them.

> "It was a mechanical operation that took place in accordance with instructions from U. S. Rubber Company that they receive not only monthly financial statements but a report of our sales progress every ten days by telephone." [R. p. 280.]

I directed my bookkeeping department to comply with the above request.

"The Referee: Let me interrupt here. [R. p. 280 to 283.] You said that you walked into Mr. Stout's office on the 15th day of each month with a check and you discussed the affairs of this business specifically and generally?

The Witness: That is true.

The Referee: Now, did you carry the statement there with you?

The Witness: I did not. The statement was due in their office between the 5th and 10th of the month, prior to the time that I made my monthly trek down to his office.

The Referee: And do you recall whether or not, within the last year of 18 months of your active business, in these discussions with Mr. Stout would there ever be one or more of these statements in evidence present at the time?

The Witness: Yes, I am certain that Mr. Stout had all of the statements at his disposal at all times and he always had the current statement in front of him, which we discussed.

The Referee: The point of the question is, in talking about your affairs, would either you or Mr. Stout or both of you actually refer to one or the other of the statements?

The Witness: We would, yes, sir.

The Referee: All right, go ahead.

Q. By Mr. Utley: Did he ever question the veracity of any of the statements? A. He never did, no, sir.

Q. In so far as you know, Mr. Ward, were all of the financial statements rendered to the U. S.

Rubber Company true and correct? A. To the best of my knowledge and belief, yes, sir.

Q. And did you intend them so to be? A. I most certainly did.

The Referee: I will ask you another question, then: The machinery was that the bookkeeper made out the statement from the records and sent it by mail, I assume?

The Witness: That is right.

The Referee: To the Los Angeles office of U. S. Rubber company?

The Witness: That is correct.

The Referee: Did you as a matter of practice see each statement before it left your office?

The Witness: I did not, no, sir.

The Referee: You mean the bookkeeper did not submit it to you before he mailed it?

The Witness: Not before he mailed it, no, sir.

The Referee: Well, what acquaintanceship or contact did you have with the monthly statements as they were prepared and sent out?

The Witness: I received a copy of the statement placed in this little black book you see here, your Honor.

The Referee: Where was that little black book usually kept in that period?

The Witness: That was kept in the office, in our safe. The bookkeeper, when we completed the month's operations, she would send United States Rubber Company a copy of the statement and place one copy in the book. At my leisure then, when I had an opportunity, I would sit down and analyze my copy.

The Referee: Did you have any regular time for doing it?

The Witness: No, I didn't, your Honor. Just as soon as I could get to that particular thing.

Cross-Examination

Mr. Swartz analyzed every asset I had. He personally went over my books, my records and my files and the details in my files and spent six or seven days in doing so. [R. pp. 284-285.] He took notes. Mr. Ostrom and Mr. Bowers were with him. The $51,200.70 items changed from time to time.

"Q. What was said about the Seal Beach property? A. In my final conference at the Ambassador Hotel, before the creditors' committee that was handling this matter, headed by Mr. Swartz, I was told that they would go along on the reorganization of my business with the $80,000 worth of notes, providing I would liquidate all of the personal assets that were available, and principally the Seal Beach property, at the earliest opportunity, and put that money into our working capital. And I was contacted from time to time, from month to month, as to what progress I was making in disposal of my property."

"In discussing the liquidation of my personal assets with the committee, it was estimated that we might obtain as much as $10,000.00 from the sale of personal assets, excluding my home and furniture. They did not demand that I liquidate the Cadillac car. They mainly wanted me to liquidate the Seal Beach and the Green Valley property.

In the early part of his assignment, Bowers spent full time at my place, [R. p. 291] which was in excess of six months full time. Bowers had authority to direct my office (bookkeeping) staff. [R. p. 292.] Mr. Bowers was in our place of business after September, 1952. He was there after February, 1953. [R. p. 293.]

"Q. Now, you stated that you told Mr. Stout in September of 1952 that you had sold the Seal Beach property, do you recall? A. That is correct, yes.

Q. Will you tell us where this conversation took place and who was present? A. It took place at the time I delivered my check to Mr. Stout in September, 1952, on or about September 15th, which was usually the time that I took it into his office, and we sat down and discussed the financial affairs again for the past month and I reminded Harry at the time as to the $2,250, he could advise New York that the Seal Beach property had been sold, that he had the $2,250 in the check which I brought in to him, and that no further proceeds could be applied from the sale of that one property.

Q. In other words, you were paying to the United States Rubber Company the proceeds of the sale of the Seal Beach property? A. Yes.

Q. Were you paying them anything additional for your note under the conditions which required you to pay them? A. I was not. I was paying the current accounts only at that time, which were the outstanding creditors' accounts.

Q. In other words, the proceeds of the Seal Beach property did not result in any additional payment to the United States Rubber Company? A. It did not.

Q. What did Mr. Stout say to you then? A. I don't recall the exact words of the conversation. We talked about the general financial affairs of the business. What related to that particular subject you will have to ask Mr. Stout.

Q. Did Mr. Stout indicate to you that any change had taken place on your personal assets section of your financial statement? A. He did not.

Q. Did you indicate to him that any change had taken place? A. We did not discuss the books at all at that time because the financial statement bearing the change was not in front of us." [R. p. 315.]

ESTHER BUHLER [Beginning R. p. 319]

I have known Mr. Ward about five and one-half years. I have known Mr. Bowers since September, 1951. I know Mr. Stout. I worked for Mr. Ward from July, 1948 to July, 1950, then I left his employ and came back again in September, 1951. When I came back, Mr. Bowers was in Mr. Ward's office and I worked under Mr. Bowers for about six months. I took my directions from Mr. Bowers. I prepared monthly financial statements. Mr. Bowers assisted me in the preparation of same, including the one for November, 1951.

The statements, Bankrupt's Exhibit 8, is in Mr. Bowers' handwriting.

Mr. Bernfeld stipulated that the money from the sale of the Seal Beach property went into the bank account.

Mr. Bowers told me how to prepare the monthly statements. "He sat down beside me and helped me put in the figures beside each amount." Mr. Ward would see a copy of the statement after it had been mailed.

CLAIR V. WARD, Transcript, Sept. 3, 1954.

OBJECTOR'S REBUTTAL EVIDENCE

"The Referee: Well, Mr. Ward, I want to ask you a question about something that bothers me considerably here.

The Witness: Yes.

The Referee: When you sold the Seal Beach lot, you realized a certain amount of cash, you put it in your personal account, and in two checks shortly thereafter that money, so you testify, was deposited in the business bank account. This was on February 28, 1953, the sale having occurred sometime in September, 1952. We find a most unique situation from an accounting or bookkeeping standpoint, that on February 28th, by means of a journal entry, the deposit of the sums of money represented by those two checks was officially recorded on the books. In the ordinary course of business, your bookkeeper, when you deposited the two checks in about the month of September, 1952, would have made an entry on the cash transaction records of the business. Apparently that was not done. Now, what do you know about it, if anything?

The Witness: Your Honor, I can explain that very clearly.

The Referee: All right.

The Witness: I deposited both deposits personally at the bank, at the time I was over to the bank in making normal deposits for the daily business deposits. I found that I required an additional thousand dollars on the first deposit to cover my outstanding checks. I deposited the $1,000 almost immediately after I received it.

I required an additional $2,250 when I sent the U. S. Rubber Company a check, and I deposited that at the bank and added that to the daily deposit, as the bank statement will show.

My bookkeeper did not officially know, or did not know, as a matter of fact, that I had made that deposit until the end of the month. Therefore, when she balanced her bank account, she found she was $3,250 out on her bank account.

And if you will look on that exhibit—

The Referee: You just go on and tell me how this happened.

The Witness: In balancing her bank account, she found she was $3,250 out, and at that time the books reflected assets composed of the $3,250 and she used it as an outstanding expense item on her bank account. She continued to use that as a continuing open item, although she could have recorded it as a loan from C. V. Ward, but she preferred to leave, of course, all reconciliation of her bank statements after the property was sold until she closed her books February 28, 1953. At the time she closed her books, then she reconciled her statements, items that had not previously been recorded to the books. "It is on every bank statement starting with the bank reconciliation of September, through October, November, December, and January and on the February 28th statement in the reconciliation of her bank account.

The Referee: Did you tell her not to officially record that money on the books?

The Witness: I did not, and I was not even aware that she had balanced her bank account in that way, your Honor." [See also R. pp. 214, to 226.]

I loaned the business money before this and the loans were carried in the same way. "Every time I loaned the company from my personal account it was credited to my drawing account." (See Bankrupt's Exhibit 11.)

MR. BOWERS

Mr. Bowers testified that he gave instructions to the lady bookkeeper for Mr. Ward. [R. p. 392.]

I made inquiries about certain items on the monthly statements, including Mr. Ward's personal items, and Mr. Ward gave me a list of the items.

APPENDIX NO. 2.

Explanation of Garibaldi and Navajo Transactions.

In December, 1951, Garibaldi Brothers ordered $13,-419.87 in tires from Ward. The cost price of these tires was $10,746.50 and is reflected in some of the figures in evidence. At Mr. Bowers' suggestion, this item was carried upon the books of Ward as "Reserve for committed sales" and if my memory serves me correctly it was carried at the cost price of $10,746.50 [Beginning R. pp. 588 to 672.]

Although Garibaldi Brothers bought a large number of tires during 1952 from Mr. Ward subsequent to the aforementioned order, this particular order was not called for or supplied. (See testimony of Dave Garibaldi and Ward). Mr. Ward's affidavit, in resistance to an affidavit filed herein by Mr. Bernfeld, shows that Mr. Ward discovered on or about February 28, 1953, that this reserve was still being carried on the monthly statements and had not been removed from same. Therefore, Mr. Ward had it removed from the February 28, 1953 statement.

The sales made to Garibaldi during 1952 were in fact substitute sales for the order of December, 1951. Mr. Dave Garibaldi testified that he had frequently placed orders for tires in the month of December, which he expected deliveries upon for the following year. So, therefore, there was nothing unusual or questionable about such a practice. The account receivable from this sale was never factored.

DECEMBER, 1952, ORDER.

In December, 1952, a similar order was given to Mr. Ward for March, April and May, 1953, deliveries. This merchandise was to be paid for in the months of delivery. U. S. Rubber at first agreed to this arrangement, issued an invoice thereon, and set the tires aside from the consigned merchandise. Bankrupt's Exhibits on file support this statement, notwithstanding the fact that U. S. Rubber subsequently tried to back out from the arrangement.

Dave Garibaldi approved these orders by signing his name "Dave" thereon, which did not indicate a delivery of the merchandise but rather an approval of the order. This constituted a memo in writing, sufficient to bind the parties under Section 1624a of the Civil Code—Statute of Frauds section.

After Ward received this order from Mr. Garibaldi and had Garibaldi's approval thereon, he factored the account with Pasadena Finance and Mr. Ward's cancelled checks will disclose that U. S. Rubber received the benefit of the money obtained from the factoring of this account. This money was not applied upon the payment of the Garibaldi tires, as they were not to be paid for until March, April and May, 1953, but it was applied upon other obligations. U. S. Rubber was paid the Garibaldi money received in March and April, 1953, and was given a check by Mr. Ward for the May, 1953, payment, but U. S. Rubber refused to cash the same and soon thereafter brought the attachment suit, which resulted in this bankruptcy.

Although, as we have hereinbefore pointed out, U. S. Rubber originally agreed to the sale arrangement to Garibaldi and for the delivery and payment in March, April

and May, 1953, and had the tires withdrawn from consignment for this purpose (see Exhibits thereon), it subsequently tried to back out of the deal and compelled Mr. Ward to return the 100 tires back into consignment stock; but, notwithstanding this fact, these tires were delivered to Garibaldi in March, April and May, 1953, as originally agreed and when delivered to Garibaldi were received by "Fred"; the slips show "Received by Fred" (see Exhibits). So, it will be seen that the word "Dave" on the invoice only represents approval of the order by Dave Garibaldi, and was not intended as a receipt for the merchandise.

During the month of February, 1953, Pasadena Finance was acquiring more accounts receivable from Ward than they felt justified in carrying from one dealer. Pasadena Finance, therefore, requested Mr. Ward to factor some of the accounts elsewhere. Mr. Ward then factored the Garibaldi account with Atlas Factors and from the moneys so received paid off Pasadena Finance. *There was no double factoring at all as claimed. It was a simple change of factors.*

So, we see that the Garibaldi sale of December, 1952, was a bona fide sale, recognized under Section 1624 Civil Code; that it was carried to completion as agreed; that Garibaldi received the merchandise in March, April and May, 1953, and paid the bill in those months; that although Ward factored this account, U. S. Rubber got the full benefit of this money at or about the time it was received; that thereafter U. S. Rubber was paid on the Garibaldi account in March and April and was given a check in May, 1953, but refused to cash it and attached instead.

Each and all of the finance companies were paid in full and no one was injured in an way, and it was never intended that anyone should be defrauded or injured.

NAVAJO TRANSACTION.

The Navajo Freight Lines ordered 36 tires for future delivery. Later, instead of taking these particular tires, it ordered 30 tires of a different kind, then the sale of the 36 tires was reversed to correct the entry on the books. This account was factored, and the finance company was paid in full. Navajo did hauling for U. S. Rubber and was required by U. S. Rubber to purchase a large number of tires in order to get the hauling business. These tires were purchased by Navajo through such an arrangement. Navajo paid Ward and Ward in turn paid U. S. Rubber. [R. pp. 883, to 908.]

There was nothing mysterious, wrong or irregular about the transaction and U. S. Rubber was fully aware of what was going on. It requested Ward to get the order and it delivered the tires to Navajo. Triester stipulates [R. p. 884.]

If Mr. Ward's statement did not reflect the true facts, he intended it to do so. He knew that U. S. Rubber was as familiar with all the facts as he was, regardless of the monthly statement. As hereinabove pointed out, there is a big difference between an incorrect statement and a false statement.

No. 16256.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH JOHNSON WILLIAMS and FRED COOK, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

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TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED

PAGE

RULES

STATUTES PAGE

No. 16256.

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BRIEF FOR APPELLANTS.

I.

JURISDICTIONAL STATEMENT.

Appellants Ruth Johnson Williams and Fred Cook, Jr., along with Juanita Smith and Eddie Jewel Bryant were indicted by the Federal Grand Jury in Los Angeles, California, March 12, 1958 (Criminal Docket No. 26654). [Tr. pp. 12-17.] The indictment is in eight counts. Neither of the appellants is mentioned in the first four counts of the indictment. The first four counts charged Eddie Jewel Bryant and Juanita Smith with violations of U. S. C., Title 21, Section 174. Appellant Williams was named in Counts Five, Six, Seven and Eight of the indictment. Appellant Cook was named in Counts Five, Six and Eight of the indictment.

Count Five of the indictment charges (21 U. S. C., Sec. 174) appellant Ruth Johnson Williams, Eddie Jewel

Bryant and appellant Fred Cook, Jr., with having, on or about February 24, 1958, sold and facilitated the sale of 2 ounces, 399 grains of heroin, a narcotic drug, to Justin Burley. [Tr. p. 14.]

Count Six charges (21 U. S. C., Sec. 174) appellant Ruth Johnson Williams, Eddie Jewel Bryant and appellant Fred Cook, Jr., with having on February 24, 1958 received, concealed and facilitated the transportation of 2 ounces, 399 grains of heroin. [Tr. pp. 14-15.]

Count Seven charges (21 U. S. C., Sec. 174) appellant Ruth Johnson Williams with having on February 24, 1958 received, concealed and facilitated the concealment of 3 ounces, 404 grains of heroin. [Tr. p. 15.]

Count Eight charges (18 U. S. C., Sec. 371) appellant Ruth Johnson Williams, one Juanita Smith and one Eddie Jewel Bryant, and appellant Fred Cook, Jr., with conspiring, beginning February 14, 1958, "to receive, conceal, sell and facilitate the transportation, concealment and sale of heroin." [Tr. pp. 15-17.] Four overt acts are alleged: (1) That on or about February 14, 1958, Eddie Jewel Bryant sold 403 grains of heroin to Justin Burley. The first overt act alleged is the same charge as that contained in Count One of the indictment in which only Eddie Jewel Bryant is mentioned; (2) That on February 17, 1958, Juanita Smith and Eddie Jewel Bryant sold and facilitated the sale of 303 grains of heroin to Justin Burley. This is the same charge as that contained in Counts Two and Three of the indictment in which appellants are not mentioned; (3) That on February 24, 1958, appellant Williams, Eddie Jewel Bryant and appellant Cook received, concealed and facilitated the transportation of 2 ounces, 399 grains, of heroin and did sell the same to Justin Burley. This is a repetition of the charges in Counts

Five and Six of the indictment; (4) That on February 24, 1958, appellant Williams received, concealed and facilitated the concealment of 3 ounces, 404 grains of heroin. This is the same charge as that contained in Count Seven of the indictment.

The four defendants were tried together. Eddie Jewel Byant was represented at the trial by Arthur Sherman; Juanita Smith, by Harry E. Weiss; and Ruth Johnson Williams and Fred Cook, Jr., by Wm. H. Neblett.

Eddie Jewel Bryant was convicted on Counts One, Two, Four, Five, Six and Eight of the indictment. [Tr. p. 80.] She did not appeal. Juanita Smith was acquitted. Appellant Williams was convicted on Counts Five, Six, Seven and Eight. [Tr. p. 81.] Appellant Cook was convicted on Counts Five, Six and Eight. [Tr. p. 82.]

Appellant Williams was sentenced to 10 years in prison and fined $5,000 on Counts Five, Six and Seven of the indictment, and 5 years in prison on Count Eight. The sentences on all Counts were made to run concurrently. The $5,000 fine of Counts Five, Six and Seven was ordered discharged by the payment of one $5,000. The judgment, sentencing appellant Williams, recites that the total time of her imprisonment is 10 years and the total fines $5,000. [Tr. p. 94.]

Appellant Cook was sentenced to 5 years each on Counts Five, Six and Eight of the indictment, the sentences to run concurrently. [Tr. p. 97.]

Ruth Johnson Williams and Fred Cook, Jr. appealed from the judgments against them. [Tr. pp. 103-104.] Their appeals are before this Court on one record. Both appellants were released on bail by the District Court pending their appeals. [Rep. Tr. p. 102.]

The acts charged in the indictment were all laid in Los Angeles, California, within the United States District Court for the Southern District of California, Central Division.

The substantive charges against appellant Williams made in Counts Five, Six and Seven and those made against appellant Cook in Counts Five and Six are all based upon the alleged happenings of February 24, 1958 and apparently all arise out of that one transaction. It was on February 24, 1958, that Ruth Williams' home was entered by federal and state narcotic officers without a valid search warrant and without a warrant of arrest and the evidence seized upon which the convictions of both appellants depend. It is upon this illegal search and seizure that Overt Acts 3 and 4 alleged in Count Eight, the conspiracy Count, are based. [Tr. p. 17.] Overt Acts 1 and 2 alleged in the conspiracy count [Tr. pp. 16-17] are but a translation into overt acts of a conspiracy of the substantive offenses charged of Counts One, Two, Three and Four, in none of which either appellant is mentioned. Counts One, Two, Three and Four charge Juanita Smith and Eddie Jewel Bryant with committing certain offenses in violation of Title 21, U. S. C., Section 174. Juanita Smith is not named in Counts Five, Six or Seven which contain the substantive charges against appellants. She is named as one of the conspirators in Count Eight and specifically charged with participation in Overt Act No. 2. [Tr. p. 17.] Juanita Smith was acquitted on all counts charged against her in the indictment. [Tr. p. 80.]

There is not a word of testimony in the record that appellant Ruth Williams ever knew or had any contact whatever, directly or indirectly, with Eddie Jewel Bryant, who was convicted on all counts upon which she was charged

in the indictment. [Tr. p. 80.] The conviction of both appellants thus rests solely upon the legality of the entry into Ruth Willaims' home without a warrant of arrest or a valid search warrant and the search and seizure of the evidence on her premises which was admitted at the trial, after two motions to suppress had been made prior to the trial and denied. The second motion to suppress was denied without prejudice. [Tr. p. 60.] The same evidence was admitted at the trial over repeated objections made by appellants Williams and Cook, and subsequent motions to strike the evidence were denied.

The trial Court, Judge Mathes, held that the search warrant under which Ruth Williams' home was entered and searched was void [Tr. pp. 36-37] and went on to hold in the same order that the search and seizure of the items in Ruth Williams' home and on her premises were done incident to a valid arrest without a warrant after the federal narcotic officers and state officers had entered her home without announcing their intention and purpose. (Sec. 3109, 18 U. S. C.)

The entry into Ruth Williams' home and the search and seizure of the evidence used to convict her and appellant Cook was clearly illegal. The first motion to suppress the evidence should have been granted. If not, surely the second one should have been granted. (*Miller v. United States* (June 23, 1958), 257 U. S. 301, 78 S. Ct. 1190; *Giordenello v. United States* (June 30, 1958), 357 U. S. 480, 78 S. Ct. 1245; *Jones v. United States* (June 30, 1958), 357 U. S. 493, 78 S. Ct. 1253.)

This Court's attention is invited to the fact that the motions of appellants Williams and Cook for acquittal and in the alternative for a new trial, made pursuant to Rule 29(b), Federal Rules of Criminal Procedure, filed

June 2, 1958 [Tr. pp. 86, 89], were denied by the trial court, Judge Harrison, June 13, 1958. [Tr. p. 98.] The denial of the motions for new trial thus occurred 10 days before the decision in the *Miller* case was handed down and 17 days before the decisions in *Giordenello* and the *Jones* cases were made. Thus the trial court did not have before it the *Miller, Giordenello,* and *Jones* cases at the time of the trial.

Counsel for appellants relied at the trial on Rules 3, 4, 5 and 41 of the Federal Rules of Criminal Procedure; *Johnson v. United States* (1948), 333 U. S. 10, 68 S. Ct. 367; *Trupiano v. United States* (1948), 334 U. S. 699, 68 S. Ct. 1229; *McDonald v. United States* (1948), 335 U. S. 451, 69 S. Ct. 191; *Kremen v. United States* (1957), 353 U. S. 346, 77 S. Ct. 828, and several other cases from this Court and from other Circuit Courts of Appeals which will be cited in argument.

The officers testified that they obtained some of the information upon which they entered appellant Williams' home from an informer. When it appeared that the informer participated in the offense, the court, Judge Mathes, compelled the officers to answer the questions of appellants' counsel, seeking to learn the identity of the informer. The officers responded to this direction of the court by naming the informer as "Jesse Thomas." [Rep. Tr. pp. 287-290.] The officers consistently denied they knew where "Jesse Thomas" was at the time of the trial or where he at any time had lived and testified that no effort had been made to find him; nor had he been subpoenaed by the Government as a witness. [Rep. Tr. pp. 506-507, 551, 556, 558.] As to the identity of the informer the officers would go no further than to say: "He is known to me as Jesse Thomas." [Rep. Tr. pp. 287-290.]

The testimony of the officers had the actual effect of refusing to reveal the identity of the informer within the meaning of the federal and state decisions on the subject. (*Roviaro v. United States* (1957), 353 U. S. 53, 77 S. Ct. 623; *People v. McShann* (1958), 50 Cal. 2d 802; *Priestly v. Superior Court* (1958), 50 Cal. 2d 812.)

The District Court had jurisdiction. (18 U. S. C., Sec. 3231.) The jurisdiction of this Court is invoked under Sections 1291 and 1294(1) of 28 U. S. C.

II.
PERTINENT STATUTES.

The indictment charges violations of Title 21, U. S. C., Section 174, and Title 18, U. S. C., Section 371, which statutes are quoted below:

Title 21, U. S. C., Section 174:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc, see section 7237(d) of the Internal Revenue Code of 1954."

Title 18, U. S. C., Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined no more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximun punishment provided for such misdemeanor."

III.
STATEMENT OF THE CASE.

Appellant Ruth Johnson Williams is a widow, 60 years old. [Tr. p. 21.] Appellant Fred Cook, Jr., is Mrs. Williams' nephew. Cook, a veteran of World War II, is 38. [Tr. p. 47.]

On the morning of February 24, 1958, the United States Commissioner in Los Angeles issued a search warrant to search the premises at 5417½ South Wilton Place.

(Appx. p. 4.)[1] Armed with the search warrant, federal narcotic officers Malcolm P. Richards and William C. Gilkey accompanied by deputy sheriffs of Los Angeles County, Arthur Gillette, A. F. Landry and William R. Farrington, entered and searched the home and premises of Ruth Williams and seized as evidence the items set up in the inventory on the return of the search warrant. (Appx. p. 5.)

Among the items seized was $15 of marked currency, one $10 bill and one $5 bill. The money was seized from appellant Williams' purse. [Rep. Tr. pp. 280-281.] Seized in the rear of house from a trash can were four small brown envelopes containing a white powdery substance, which was afterwards found to be heroin. Appellant Cook was on the premises at the time. The premises were entered around 3:00 o'clock in the afternoon. The officers just opened the door and walked in without saying a word. (Sec. 3109, 18 U. S. C.; Sec. 7607, 26 U. S. C.) The officers made a thorough search of the upstairs living quarters, the downstairs rumpus room, the washroom and the yard. [Rep. Tr. pp. 304-308.] After the search was over, appellants Williams and Cook were taken to the federal narcotics office in the Federal Building and were held there for about 3 hours. They were then booked in the Los Angeles County Jail on suspicion of a federal narcotic violation. [Rep. Tr. pp. 710-718.]

Appellants Williams and Cook were arrested some time in the late forenoon of the next day, February 25, 1958.

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[1]The record here is quite voluminous so appellants have, for the convenience of the court, placed in the appendix to this brief the affidavits for search warrant (Appx. pp. 1-3), the search warrant and return thereon (Appx. pp. 4-5), and the statement or alleged confession of appellant Cook. (Appx. pp. 6-7.)

On the affidavit of federal narcotic agent Malcolm Richards, dated February 25, the United States Commissioner, issued a complaint against and a warrant for the arrest of appellants Williams and Cook. [Tr. pp. 1-2.] The warrant was executed by the United States Marshal, who arrested both appellants in the Federal Building in United States Commissioner Hocke's office, February 25. [Tr. p. 2.] On orders of the Commissioner both appellants were committed to the Los Angeles County jail. [Tr. pp. 3-4.] The appellants were indicted March 12. [Tr. pp. 12-17.]

Appellant Williams filed on April 14, 1958, some five weeks prior to the date of the trial, a motion to suppress the evidence seized on February 24, and inventoried in the return of the search warrant. [Tr. pp. 19-28.]

The case was in the courts of the following judges in the order stated—Judge Byrne, Judge Clarke, Judge Hall, Judge Mathes, and Judge Harrison.

Appellant Williams' motion to suppress evidence came on for hearing before Judge Mathes April 28, 1958. The motion was denied by a formal written order entered by the court. [Tr. pp. 36-38.] The court found that the search warrant issued for the search of appellant Williams' home was void on its face, under Rule 41, Federal Rules of Criminal Procedure, but held that Mrs. Williams was validly arrested by the officers who entered her home without a warrant for her arrest; and, that the search of her home and the seizure of the evidence was incident to a valid arrest. [Tr. pp. 36-37.]

Appellant Williams filed a second motion May 9, 1958, joined in by appellant Cook, to suppress the evidence which the court had held on April 28 [Tr. pp. 36-37] was seized from Ruth Williams' home as an incident to a valid ar-

rest. [Tr. pp. 41-49.] The motion was also directed at the suppression of the alleged written statement or confession of appellant Cook, taken from him in the federal narcotic office in the Federal Building in the evening of February 24, 1958, where he was detained some three hours for the purpose of questioning by federal narcotic officers, before he was booked. [Tr. pp. 41-43.] The motion came on for hearing May 19, before Judge Mathes. The court denied the motion without prejudice. [Tr. p. 60.]

On the next day, May 20, when the case was called for trial, Judge Mathes transferred the case to Judge Harrison. The trial was had before Judge Harrison with a jury. Deputy Sheriff Farrington was the first witness called by the Government. The greater part of Farrington's testimony was consumed with detailing his activities in connection with Eddie Jewel Bryant and Juanita Smith relating to the first Four Counts in the indictment, which are not material on this appeal. Toward the end of his direct testimony, Farrington testified that at approximately 2:45 to 3:00 p.m., he and deputy sheriffs Gillette and Landry, in company with federal narcotic agent Richards, entered Ruth Williams' home at 5417½ South Wilton Place, Los Angeles, and that deputy sheriff Gillette placed her under arrest. [Rep. Tr. pp. 234-235.] At the time, federal narcotic agent Richards was armed with a search warrant which had been issued that morning. Federal narcotic agent Richards spoke to appellant Williams and told her that he had a search warrant for the search of her place and a complete search was made of the house and the yard. [Rep. Tr. p. 235; Appx. pp. 4-5.] Farrington said that "in the upstairs portion, in the living room, Sgt. Landry removed from her purse a large

parcel of money and spread it on the table in the living room. At that time, "I shined the fluorescent light on these moneys and as I recall, two bills fluoresced." [Rep. Tr. p. 235.] The bills referred to were a $10 and a $5 bill inventoried in the search warrant. (Appx. p. 5.) At this time, counsel for defendant Ruth Williams objected as follows:

> "Mr. Neblett: If your Honor please, on behalf of the defendant Ruth Williams we object to this testimony on the ground that it was an illegal search and seizure and in violation of the defendant, Ruth Williams,' constitutional rights under the 4th Amendment. I would like to present that matter to your Honor at this time.
>
> The Court: *I think I told you that has been heard before Judge Mathes and he has made a ruling, and, of course, I will not admit any evidence relative to a search as far as a search warrant is concerned, under his ruling, but any search incident to an arrest I will admit.*[2]
>
> Mr. Neblett: If your Honor please, I am well advised as to the Court's statement yesterday in chambers, but this morning I checked with Mr. Jones, the Clerk for Judge Mathes, and the only Order issued by Judge Mathes on Monday at the time the Court is now talking about was a motion to suppress evidence, *which was denied without prejudice. That would indicate that we would have a right to renew it now and I would say that I feel confident that if we do not renew it at this time we may waive it. I don't feel we should waive it.*

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[2]All emphasis ours unless otherwise specified.

The Court: I think it is proper for you to protect your record *but inasmuch as it was heard by Judge Mathes, I am not going to rehear it.*

Mr. Neblett: Well, then, if your Honor please, may I put my objection in a little more technical form, I should say.

The Court: Yes.

Mr. Neblett: The objection and the motion on behalf of defendant Williams are that *we move to exclude all evidence turned up by the search of the defendant's home, Ruth Williams' home, on February 24, 1958, on the ground that the search was made without a warrant, without a search warrant, and on the ground that the arrest or the alleged arrest was made without a warrant of arrest and that the search without a warrant was made in violation of Rule 41 of the Federal Rules of Criminal Procedure, in that the arrest without a warrant was made in violation of Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure, and that the search and the evidence turned up was all illegal evidence and should be excluded on the Rule of the Mallory case and the Cahan case.* Would your Honor like me to get the citations for those cases?" [Rep. Tr. pp. 234-238.]

The Court: I am familiar with them, I think.

Mr. Sheridan: Your Honor, if I may just for the purpose of the record—

The Court: I want to ask the witness a question. *You went out and placed the defendant Williams under arrest. Did you have a warrant at that time?*

The Witness: *I did not, sir.*

The Court: Had a warrant been issued?

The Witness: To my knowledge I do not know.

Mr. Neblett: If your Honor please—

The Court: *Under what authority did you go out there and place her under arrest?*

The Witness: I had reason to believe due to the date of the prior occasion of observing the female defendant, Eddie Jewel Bryant, enter this house prior to a narcotic transaction—enter the house, leave that house, joined Deputy Burley and immediately delivered to him approximately one ounce of heroin on one occasion, and on another occasion Detective Burley advised me that he had gone to the area of 5417½ Wilton Place.

I had information from a confidential informant, from Jesse Thomas, to the effect that Ruth Williams, who lived at 5417½ Wilton Place, was engaged in the illegal sale of narcotics.

I, on the 24th, observed the same 1954 Chevrolet driven by Fred Cook—1957—excuse me, a 1957 Chevrolet driven by Fred Cook, which the license number had been previously run and it had been observed in the vicinity of 5417½ on occasions when we maintained our surveillance of that neighborhood.

Mr. Neblett: If your Honor please, I hate to interrupt the witness, but this is in front of a jury and a lot of this is hearsay and we move that it be stricken.

The Court: *Well, how did you gain entrance to this place where Mrs. Williams lived?*

The Witness: *Walked in the door.*

The Court: *Was the door locked?*

The Witness: *No, sir.*

The Court: *It was not?*

The Witness: *Just walked in and placed her under arrest. Deputy Gillette knocked on the door several times. There was no answer. We tried the door. It opened and we walked in.*

The Court: Well, counsel this defendant was charged with a felony and the officer had a right to place her under arrest.

Mr. Neblett: Not without a warrant when the circumstances are such that a warrant is easily obtainable. *And besides he didn't enter the house with the idea of arresting her. The witness said awhile ago that he walked—that he went in with a search warrant to search the house.*

The Court: *Was a search warrant your authority for entering the place?*

The Witness: *No, sir, it was not. I entered 5417½ Wilton Place for the express purpose of arresting the defendant Williams."* [Rep. Tr. p. 235, line 12, to p. 239, line 13.]

At this point the Court adjourned for lunch. At the beginning of the afternoon session, these proceedings were had:

"The Court: Let the record show that these proceedings are in the absence of the jury.

Gentlemen, relative to the motion to suppress made before lunch *I am prepared to rule upon after talking with Judge Mathes.*

I want you to protect your record, of course, *but I am going to hold that this matter has been heard before Judge Mathes and passed upon by him and for the sake of the record I have a transcript of the hearing and I am willing that that be made a part of the record in this case so you will be fully protected as far as your record is concerned.*

I feel that the ruling by another judge of this court may not be completely binding upon me but I am not going to disturb it. * * *

The Court: *Judge Mathes had held it was a search in pursuance of a valid arrest. He held that the search warrant itself was invalid but that it was a valid arrest and a search was made in pursuance of it.*

I am simply going, in effect, to adopt his ruling and the record that was made before him can become a part of this record.

Mr. Neblett: If your Honor please, may I now state the objection and cite two cases. I won't argue them—if I may.

The Court: Yes.

Mr. Neblett: The defendant Ruth Johnson Williams objects to the admission of any evidence turned up at the search of her home at 5417½ Wilton Place, Los Angeles, California, on February 24, 1958, made by Deputy Sheriffs of Los Angeles County and made by Federal narcotic officers.

I move to exclude all such evidence on the ground that the search was made pursuant to an illegal and void search warrant and that the alleged search came after—the alleged search claim of the Government to have been made incident to a lawful arrest was made without a search warrant and was an unreasonable search and seizure prohibited by the Fourth and Fourteenth Amendments to the Constitution of the United States and in violation of Rules 3, 4 and 41 of the Federal Rules of Criminal Procedure.

Now, if your Honor please, I desire just to cite two cases in support of my motion.

I cite the case of Baumboy v. United States, from the Circuit Court of Appeals, Ninth Circuit, decided in 1928, 24 F. 2d at page 512, and the case of *Work v. United States,* decided by the Court of Appeals for the District of Columbia, 1957, 243 F. 2d at page 660.

And with that objection, your Honor, I submit the objection and the motion.

The Court: *I am going to admit the evidence as being a valid search as a result of a valid arrest made at that time in accordance with the rulings of Judge Mathes heretofore made after, I think counsel told me, five hours of testimony and argument.*

Mr. Neblett: If your Honor please, may I also ask the court to consider as a part of the record, in addition to the transcript which the court has before it now, the motion and affidavits on the first motion to suppress and the motion and affidavits on the second motion to suppress.

The Court: I presume that will be a part of the record. I haven't any objection to you making any part of anything that has transpired before Judge Mathes a part of the record in this case.

As a matter of fact I will direct it be written into the transcript if you want it.

Mr. Neblett: If your Honor please, I suppose that the denial of this motion does not preclude us from raising it again on a motion to acquit or something of that sort.

The Court: As I have told you before I want you to do anything you feel is proper in the protection of your clients' rights.

As to the extent that I will listen to argument on the rulings that Judge Mathes made I will have to cross that bridge when I come to it.

Mr. Neblett: *Very well, your Honor. I would like to reserve, if possible, a motion to strike this testimony on other grounds after it is in.*

The Court: I am perfectly willing that *you reserve your right to make a motion to strike any evidence in this case.*

> Mr. Neblett: I would like to do so in this case.
>
> The Court: In connection with the rulings by Judge Mathes at a hearing before him some time ago, I am going to direct the court reporter to copy into the record the proceedings had before him at that time." [Rep. Tr. p. 243, line 7, to p. 246, line 25.]

Pursuant to the Court's direction, there was included in the Reporter's Transcript the proceedings had before Judge Mathes on April 28, 1958, and they appear here in the Reporter's Transcript from pages 248 to 268, inclusive.

The substance of testimony of the officers on direct examination which was admitted over the objections of the appellants, detailed in the quotations above from pages 235 to 239, and pages 243 to 246 of the Reporter's Transcript follows:

In the afternoon of February 24, 1958, at approximately 3:00 o'clock in the afternoon, federal narcotic officer Malcolm Richards and William Gilkey accompanied by deputy sheriffs of Los Angeles County, Gillette, Landry and Farrington entered the gate opening into the small yard of Ruth Williams' home and went up the staircase on the outside wall of her apartment, to the entrance to her living quarters. Gillette said that he was in the lead. He reached the door at the top of the stairs and after knocking and receiving no response, he tried the door and found it unlocked. No one of the officers called to find if anyone was in the house, or made any remark whatever. [Rep. Tr. pp. 269-273.]

The officers opened the door, walked into the front room and then into the hallway and into one of the bedrooms. Appellant Williams was standing in the doorway of this

bedroom, next to a cedar chest. [Rep. Tr. pp. 276-277.] At or about this time, Gillette said that he placed appellant Williams under arrest for violation of the federal narcotic's laws. It was then that federal narcotic officer Richards made the statement to her that he had a search warrant to search the premises. [Rep. Tr. pp. 280-281.] The house was thoroughly searched by the officers but no narcotics were found in the house. [Rep. Tr. p. 283.] Upon entry into the house, the officers took Ruth Williams' handbag and had her pour its contents onto the table of the living room. [Rep. Tr. pp. 280-281.] A fluorescent lamp was put on the money obtained from Ruth Williams' handbag, and commingled with this money was $15 in marked currency, a $10 bill and a $5 bill. (Appx. p. 5.)

The living quarters in the upstairs part of the house, consisting of a kitchen, living room, bathroom, a small dining room and two bedrooms, together with downstairs rumpus room and wash room, were thoroughly gone over, about two hours being consumed in making the search. [Rep. Tr. pp. 278-279.] None of the officers had a warrant for the arrest of Ruth Williams or of Fred Cook, Jr. Cook was picked up by the officers in the downstairs rumpus room. [Rep. Tr. p. 283.]

Federal narcotic officer Malcolm Richards had a search warrant and he made his return thereon, a copy of which, and the inventory, he left on the premises when the officers took appellants to the federal narcotic office in the Federal Building downtown. This was the search warrant (Appx. pp. 4-5) which Judge Mathes had held void under Rule 41, Federal Rules of Criminal Procedure. [Tr. p. 36, line 24.]

Officer Richards' testimony as to the method of entry was substantially the same as that of Gillette. He ad-

mitted that he had a search warrant with him at the time. Richards told Williams when he entered the house that he had a search warrant for her home and showed the search warrant to her. [Rep. Tr. p. 304.] Richards showed her his identification, his pocket badge and the search warrant. He searched thoroughly every room in the house. [Rep. Tr. p. 306.] Richards said that he gave appellant Williams a copy of the search warrant and she read it. He identified the copy as the same copy of the search warrant which was marked as Defendant's Exhibit C at the hearing before Judge Mathes. [Rep. Tr. p. 307; Appx. pp. 4-5.] Richards said that he later took the copy of the search warrant from Mrs. Williams and put down on it all the articles that were seized during the search. These articles are entered on the return of the search warrant. [Rep. Tr. pp. 308-309; Appx. p. 5.]

The heroin mentioned in the return of the search warrant was found in the back in a garbage can. Richards said that although he made a thorough search of the house, both the living quarters upstairs and the rumpus room and other parts of the house downstairs, he found no narcotics in the house. There were five or six garbage trash cans in the area at the southwest corner of the building. There are four units in the flat building which front on Wilton Place. Those units also have an entrance through the gate off the alley which leads to Mrs. Williams' living quarters in the rear. Four flat units and appellant Williams' old garage apartment are all on one lot, the whole being owned by appellant Williams. The five or six garbage or trash cans, in one of which the heroin was found,

were commonly used by all of the tenants of the place, including the appellant Williams. Richards was not present when the heroin was found. He was making a search of the living quarters. Federal narcotic officer Gilkey had charge of the search of the yard and the premises adjacent to appellant Williams' apartment.

While he was on the stand, Richards identified his signature on the two affidavits he made for the search warrant. Richards said he was present when Justin Burley signed the other affidavit for the search warrant. [Rep. Tr. pp. 301-313; Appx. pp. 1-3.]

The illegality of the entry into appellant Williams' home and the search and seizure of the evidence contained in the inventory on the return of the search warrant (Appx. p. 5) was raised on the first motion of appellant Williams to suppress the evidence [Tr. p. 19] and in the second joint motion of appellants Williams and Cook to suppress the evidence. [Tr. p. 41.] The subject was raised before the trial court at every stage of the proceedings: (1) Appellants' objection to the testimony of the officers, made before Judge Harrison, *ante;* (2) Appellants' objection to the admission in evidence of Government's Exhibits 7-A, 7-B, 8, 8-A, 8-B, 8-C, 8-D and 9 [Rep. Tr. pp. 382-384], which exhibits designate all of the articles included in the inventory of the search warrant (Appx. p. 5); (3) Appellants' motion to strike the testimony of the officers relating to the search and seizure, and to strike Exhibits 7-A, 8, 8-A, 8-B, 8-C, 8-D and 9 [Rep. Tr. pp. 592-593]; (4) Appellants' motion to acquit Williams and Cook, made at the

conclusion of the Government's case [Rep. Tr. p. 570]; (5) The admission in evidence of the alleged confession of appellant Cook [Govt. Ex. 16; Appx. pp. 6-7] over the objection of the appellants [Rep. Tr. pp. 715-731]; (6) The motion for acquittal and motion in the alternative for new trial of appellant Williams and the motion for acquittal and motion in the alternative for new trial of appellant Cook. [Tr. pp. 83-86; Rep. Tr. pp. 87-89.]

Appellants contend that the search of Ruth Williams' home by federal narcotic officers without a warrant of search or arrest violated the constitutional rights guaranteed to appellant Williams by the Fourth Amendment to the Constitution, and that the evidence seized upon the search of her home was erroneously admitted in evidence at the trial as against her and her co-defendant, appellant Cook; that the court should have compelled the Government to reveal the true identity of the informer or the indictment should have been dismissed; that the court should have sustained the objections of the appellants to the receipt in evidence of the confession of appellant Cook; that the evidence was insufficient to justify the verdict finding the appellant Williams guilty on any one of the four counts in the indictment upon which she was convicted, Counts Five, Six, Seven or Eight; and that the evidence was insufficient to justify the verdict finding the appellant Cook guilty on any one of the three counts in the indictment upon which he was convicted, Counts Five, Six or Eight.

IV.
ASSIGNMENT OF ERRORS.

1. The trial court, Judge Mathes, erred in denying the motion of appellant Williams to suppress the evidence seized by federal narcotic officers and deputy sheriffs of Los Angeles County upon the entry of her home without a valid search warrant or a warrant of arrest. [Tr. pp. 36-38.]

2. The trial court, Judge Mathes, erred when he denied the joint motion of appellants Williams and Cook to suppress the evidence seized by federal narcotic and state officers upon the search of the home of Ruth Williams as an incident to an alleged valid arrest without a warrant for the arrest of Ruth Williams, and to suppress the evidence of an alleged confession [Govt. Ex. 16; Appx. pp. 6-7] of appellant Cook. [Tr. p. 60.]

3. The trial court, Judge Harrison, erred when he refused to reconsider the orders of Judge Mathes denying the motions to suppress which orders were made by Judge Mathes without prejudice [Tr. p. 60] and the refusal by Judge Harrison to sustain the objections of appellants to the evidence seized upon the search of Ruth Williams' home. To avoid repetition, appellants refer the court to Point III, *ante,* STATEMENT OF THE CASE, where the evidence is digested, and the objections quoted in full as required by Rule 18(d).

4. The trial court, Judge Harrison, erred in overruling the objections of appellants to the testimony of the federal narcotic and state officers relating to their entry into the home of Ruth Williams without a warrant of search or of arrest and the seizure of the evidence, Government's Exhibits 7-A, 7-B, 8, 8-A, 8-B, 8-C, 8-D and 9. [Rep. Tr.

pp. 229, 373, 384.] This evidence is digested as required by Rule 18(d) and the objections quoted in full, *ante,* under III, STATEMENT OF THE CASE. The exhibits mentioned are the items seized from Ruth Williams' home and premises on February 24, 1958, and they are the same items as those entered in the inventory in the return of the search warrant, page 5 of the appendix. Upon the offer by the Government of the exhibits, counsel for appellants renewed the objections that he had made at the beginning to the testimony of the witnesses and to the admission of the paraphernalia in evidence and the court stated:

> "The Court: *I will state now, Mr. Neblett, that the admission of any of the articles that were obtained in the home of Mrs. Williams in evidence will be subject to your objections and the rulings heretofore made. Does that cover the situation?"* [Rep. Tr. pp. 382-384.]

5. The trial court, Judge Harrison, erred in denying the separate motions for acquittal made on behalf of each of the appellants Williams and Cook at the conclusion of the Government's case. The motions are as follows:

> "Mr. Neblett: If your Honor please, I desire to make a separate motion for Ruth Williams for acquittal and a separate motion for Fred Cook for acquittal at this time on the grounds that the evidence is insufficient to sustain a conviction as to either one of those defendants." [Rep. Tr. p. 570, line 22, to p. 571, line 1.]

In denying the motions, the court said:

> "The Court: Well, I feel the evidence on these counts *involving Mrs. Williams and Mrs. Bryant, the substantive counts, the evidence is not strong but I think it is sufficient for a jury to pass upon. The fact*

that very shortly after the sale some of the money showed up in the possession of the defendant Williams is certainly to be considered by the jury. It is circumstantial evidence that they may or may not convict or acquit the defendant on.

I will agree the evidence against Williams and Cook is much weaker than it is against the other defendants, but I think it is sufficient and I think it would be an abuse of my prerogative to grant a judgment of acquittal as to those counts.

I think it is a jury question.

If the jury convicts them it would be a question then to be determined on a motion for a new trial or judgment of acquittal after a verdict, but I think it is a question that should be submitted to the jury."

* * * * * * * *

"The Court: Counsel, I feel that the matter should be submitted to the jury for its determination and verdict.

The matter will be submitted to the jury as to each defendant and as to each count.

Of course, I think the strongest evidence is against the defendant Bryant. To me, as long as the jury is not present, it is very strong, but as to the other defendants, including the defendant Juanita Smith, except the fact that these people were in such close contact with each other and apparently were delivering heroin to these various places, with all these three cars involved—I don't know whether they have been impounded by the Government or not, but I think it is getting down to a point where the evidence here is sufficient for the jury to at least pass upon the question." [Rep. Tr. p. 578, lines 6-24; p. 580, lines 2-16.]

6. The trial court, Judge Harrison, erred in denying appellants' motion to strike all of the evidence of the items turned up upon the search of Ruth Williams' home and the articles there seized. The motion was made at the conclusion of the Government's case. The motion and the ruling thereon are as follows:

> "Mr. Neblett: The court will recall that I made a motion to—pardon me—*I made an objection to all of the evidence which was introduced that was turned up at the search and seizure at 5417½ South Wilton, and the court overruled that objection subject to a motion to strike. I now would like to renew my motion to strike and to submit it without argument.*
>
> The Court: *The motion is denied.*" [Rep. Tr. p. 592, line 20, to p. 593, line 2.]

7. The trial court, Judge Harrison, erred in permitting the Government, after the close of the case, to reopen and offer in evidence the alleged confession of appellant Cook.

> "Mr. Sheridan: I think this will have to be done outside of the jury. It concerns the confession from the defendant Fred Cook. At this time, after talking it over with my office, they think we should put the confession into evidence, and I know Mr. Neblett has the request to take it up on voire dire outside of the jury before we offer the confession, and I want to give him the opportunity and let him know that is my intention of offering this confession of the defendant Fred Cook into evidence.
>
> The Court: I think it should be heard outside of the presence of the jury to see whether or not it is voluntary." [Appx. pp. 6-7; Rep. Tr. p. 644, line 19, to p. 645, line 5; p. 646, lines 14-16.]

The appellant Cook objected to the confession:

> "Mr. Neblett: I think that is all, your Honor. I renew our objection. It hasn't been shown by the Government it (the confession) was a voluntary statement. He was at that time under restraint. I renew the objection on that ground.
>
> The Court: *I think that is a question for the jury whether it was free and voluntary.*
>
> I might instruct the jury at this time that this (the confession) *is only binding upon the defendant Fred Cook and is not to be considered as evidence whatsoever as to any of the other defendants in the case.* And, also, as far as this statement is concerned if the jury feels it was unfairly taken in any way, shape or form, they are to disregard it.
>
> Mr. Sheridan: *I want to state for the record the Government offers that particular exhibit only as to Fred Cook.*
>
> The Court: It will be admitted, and you can read it to the jury." [Rep. Tr. p. 727, line 21, to p. 728, line 13.]

The court admitted the alleged confession into evidence as Government's Exhibit 16 and directed that it be read to the jury. Exhibit 16 was read to the jury by United States Attorney, Mr. Sheridan. [Rep. Tr. p. 728, line 14, to p. 731, line 19.] In order to comply with Rule 18(d) of this court, we refer the court to Appendix, pages 6 and 7, where Exhibit 16 is reproduced in full.

8. The trial court, Judge Harrison, erred in denying the separate motions made at the close of the case on behalf of appellant Ruth Johnson Williams and appellant

Fred Cook, Jr., for an acquittal. The motion was as follows:

> "Mr. Neblett: If your Honor please, I would like to make separate motions on behalf of the defendant Ruth Johnson Wiliams and the defendant Fred Cook, Jr. for acquittal pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure, on Counts Five, Six, Seven and Eight of the indictment.
>
> Insofar as Ruth Williams is concerned, Ruth Williams is mentioned in Counts Five, Six, Seven and Eight, and Fred Cook is mentioned in Counts 5, 6 and 8. He is omitted from Count Seven.
>
> The Court: You are making the same motion for judgment of acquittal?
>
> Mr. Neblett: Definitely, your Honor.
>
> The Court: Motion denied." [Rep. Tr. p. 780, lines 5-18.]

9. The trial court, Judge Harrison, erred in not dismissing the action on the appellants Williams and Cook's motions to acquit made at the close of the Government's case and at the close of the case, as the court did not require the Government to divulge the identity of the informer. [Rep. Tr. pp. 237-339, 287-290, 506-507, 551-557.]

10. The trial court, Judge Harrison, erred in denying the motion of appellant Williams for acquittal and motion in the alternative for a new trial made pursuant to the provisions of Rule 29(b) of the Federal Rules of Criminal Procedure. [Tr. pp. 83-86.]

11. The trial court, Judge Harrison, erred in denying the motion of appellant Cook for acquittal and motion in the alternative for a new trial made pursuant to the provisions of Rule 29(b) of the Federal Rules of Criminal Procedure. [Tr. pp. 87-89.]

V.
SUMMARY OF ARGUMENT.

The search by federal and state narcotics officers of appellant Ruth Johnson Williams' home at 5417½ South Wilton Place, Los Angeles, California, February 24, 1958, under a void search warrant, was done in violation of appellant's rights guaranteed to her by the Fourth Amendment to the Constitution and the motion of appellant Ruth Johnson Williams to suppress the evidence seized during that illegal search and seizure should have been granted.

Federal Rules of Criminal Procedure, Rule 41;

Perry v. United States (C. A. 9, 1926), 14 F. 2d 88, 89;

Brown v. United States (C. A. 9, 1925), 4 F. 2d 246, 247;

Byars v. United States (1927), 273 U. S. 28, 47 S. Ct. 248;

United States v. Di Re (1948), 332 U. S. 581, 68 S. Ct. 222;

Johnson v. United States (1947), 333 U. S. 10, 68 S. Ct. 367.

The search of appellant Williams' home, having been made under a void search warrant, the result was the same as if the search had been made without a search warrant and seizure of the evidence thereunder cannot be justified as an incident to the arrest of the accused, as the arrest of the accused without a warrant is no more defensible than a search under a void search warrant.

Baumboy v. United States (C. A. 9, 1928), 24 F. 2d 512, 513;

United States v. Baldocci (D. C. S. D. Cal. N. D. 1930), 42 F. 2d 567.

Belief on the part of the arresting officers, however well-founded, that narcotic drugs were concealed in appellant Ruth Williams' dwelling house, furnished no justification for the search of her home without a warrant. Searches of homes without a warrant have universally been held to be unlawful notwithstanding facts unquestionably showing probable cause.

Agnello v. United States (1925), 269 U. S. 20, 46 S. Ct. 4;

Johnson v. United States (1947), 333 U. S. 10, 68 S. Ct. 367;

Trupiano v. United States (1948), 334 U. S. 699, 68 S. Ct. 1229;

McDonald v. United States (1948), 335 U. S. 451, 69 S. Ct. 191;

Miller v. United States (1958), 357 U. S. 301, 78 S. Ct. 1190;

Jones v. United States (1958), 357 U. S. 493, 78 S. Ct. 1253;

Poldo v. United States (C. A. 9, 1932), 55 F. 2d 866;

Giordenello (1958), 357 U. S. 480, 78 S. Ct. 1245.

Where a home, as Ruth Williams' was, is entered by officers without a warrant for the purpose of making an arrest, the arrest is illegal and any evidence turned up, if admitted at the trial, a conviction following will be reversed.

18 U. S. C., Sec. 3109;

People v. Brown (1955), 45 Cal. 2d 640;

Work v. United States (C. A. D. C., 1957), 243 F. 2d 660;

Woods v. United States (C. A. D. C., 1957), 240 F. 2d 37;

Watson v. United States (C. A. D. C., 1957), 249 F. 2d 106;

Williams v. United States (C. A. D. C., 1956), 237 F. 2d 789;

Poldo v. United States (C. A. 9, 1932), 55 F. 2d 66;

Johnson v. United States, supra;

Trupiano v. United States, supra;

McDonald v. United States, supra;

Miller v. United States, supra;

Jones v. United States, supra.

When it appears, as it did here, that the search of Ruth Williams' home and not the arrest was the real object of the officers in entering upon the premises, and the arrest is a pretext for, or at most an incident to the search, the search is not reasonable within the meaning of the Fourth Amendment.

18 U. S. C., Sec. 3109;[3]

McKnight, et al. v. United States (C. A. D. C., 1950), 183 F. 2d 977;

Miller v. United States, supra;

Baumboy v. United States, supra.

A federal agent, when obtaining evidence for a federal prosecution, is obliged to obey the Federal Rules of Criminal Procedure relating to searches and seizures.

Rea v. United States (1956), 350 U. S. 214, 76 S. Ct. 292.

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[3]"§3109. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. June 25, 1948, c. 645, 62 Stat. 820."

The essence of a statutory provision or rule of law forbidding the acquisition of evidence in a certain way is not merely that the evidence so acquired shall not be used before the court in a criminal trial, but that it shall not be used at all.

Nardone v. United States (1939), 308 U. S. 338, 60 S. Ct. 266;

Weiss v. United States (1939), 308 U. S. 321, 60 S. Ct. 269.

The entry of federal narcotic officers and the Los Angeles deputy sheriffs upon Ruth Johnson Williams' premises at 5417½ South Wilton Place, Los Angeles, California, without a warrant of arrest and without a valid search warrant, and the arrest of Ruth Johnson Williams and Fred Cook, Jr., within the premises was illegal and void. Motions of appellants Ruth Johnson Williams and Fred Cook, Jr. to suppress the evidence turned up as a result of such search and seizure should have been granted, as probable cause for the belief that a seizable article is in a dwelling house does not authorize a search of the house without a search warrant, although it may be sufficient to obtain a search warrant.

United States Constitution, 4th Amend.;[4]

18 U. S. C., Sec. 3109;

F. R. C. P., Rules 3, 4, 41;

Papani v. United States (C. A. 9, 1936), 84 F. 2d 160;

Lee v. United States (C. A. D. C., 1956), 232 F. 2d 354.

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[4]"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal narcotic officers Richards and Gilkey, who conducted the search and participated in the arrest of the appellants, were authorized by statute to make the arrest and to conduct the search without the aid of state officers. (26 U. S. C., Sec. 7607, effective July 18, 1956.) However, prior to the adoption of Section 7607, participation by a federal officer with state officers in making an arrest or search, however small, made the operation a federal one.

Byars v. United States, supra;

Lustig v. United States (1949), 338 U. S. 74, 69 S. Ct. 1372.

Evidence obtained in violation of one defendant's Constitutional guarantees against unreasonable search and seizure is inadmissible against another defendant tried with him in the same action.

McDonald v. United States, supra.

California, where the offenses charged in the indictment are laid, has adopted the exclusionary rule.

People v. Cahan (1955), 44 Cal. 2d 434;

Badillo v. Superior Court (1956), 46 Cal. 2d 269.

The seizure of the paraphernalia from appellant Williams' home itemized in the return on the search warrant (Appx. p. 5) and admitted in evidence over the objection of appellants was prejudicial error.

Kremen v. United States (1957), 353 U. S. 346, 77 S. Ct. 828.

An arrest or search on an illegal warrant violates the Fourth Amendment to the Constitution and a conviction obtained on such evidence will be reversed.

Giordenello v. United States, supra;

Agnello v. United States, supra;

Miller v. United States, supra;

Jones v. United States, supra.

The refusal of the court to compel the officers to reveal the true identity of the informer required a dismissal of the case on appellants' motions to acquit.

Roviaro v. United States (1957), 353 U. S. 53, 77 S. Ct. 623;

People v. McShann (1958), 50 Cal. 2d 802;

Priestley v. Superior Court (1958), 50 Cal. 2d 812.

The alleged confession of appellant Cook, taken from him in the federal narcotic office in the Federal Building in Los Angeles by Malcolm Richards, federal narcotic officer, during the period of his unlawful detention, within the meaning of Federal Rules of Criminal Procedure, Rule 5(a), 18 U. S. C. A., rendered inadmissible the statements elicited from Cook while he was being so unlawfully detained.

Mallory v. United States (1957), 354 U. S. 449, 77 S. Ct. 1356;

Watson v. United States (C. A. D. C., 1957), 249 F. 2d 106;

Carter v. United States (C. A. D. C., 1957), 252 F. 2d 608.

VI.

ARGUMENT.

POINT I.

The Search by Federal and State Narcotic Officers of Appellant Ruth Williams' Home Under Color of a Void Search Warrant Violated Her Constitutional Rights Under the Fourth Amendment to the Constitution and Appellant Williams' Motion to Suppress the Evidence Seized During the Illegal Search Should Have Been Granted.

There is no dispute over the Government's version of the facts. In the afternoon of February 24, 1958, at around 3:00 p.m., federal narcotic officers Malcolm Richards and William Gilkey, accompanied by deputy sheriffs of Los Angeles County, Gillette, Landry and Farrington, entered the gate off the alley opening into the small yard of Ruth Wiliams' home. Federal narcotic officer Richards and deputy sheriffs Gillette, Landry and Farrington went up the staircase on the outside wall of Williams' apartment, to the entrance to her living quarters. Federal narcotic officer Gilkey went into the yard and rumpus room and washroom which were downstairs under the living quarters of Mrs. Williams. When Richards and the three deputy sheriffs reached the landing at the top of the stairs, on which there is a door, the entrance to the living quarters, the doors, which consisted of a wire screen door and a regular door, were closed. The officers knocked on the screen door but received no response. They then tried the door, found it unlocked and entered the house. They presented the search warrant which federal narcotic officer Richards had to Williams, whom they found standing in one of the two bedrooms. Apparently, she had just gotten out of bed in

response to the knocking, but the officers entered so quickly after a knock or so that she was unable to inquire as to who was coming in. After showing appellant Williams the search warrant, the officers used up about two hours in which they made a thorough search of the upstairs living quarters, which consisted of a kitchen, a dinette, hallway, living room, two bedrooms and bathroom, and a thorough search of the rumpus room and washroom below, and the yard of Ruth Williams' apartment.

No narcotics were found in the living quarters, and none were found in the under part of the house or the yard. Four small brown envelopes were found in a garbage or trash can in the back, containing a white powdery substance which was afterwards determined to be heroin. There were some five or six trash cans in the back of the four-flat units which front on South Wilton Place. The four tenants occupying the units facing on Wilton Place in front of Ruth Williams' apartment, which was a made over garage, used in common with appellant Williams the five or six trash cans, in one of which the narcotics were found. [Appx. pp. 4-5; Rep. Tr. pp. 269-273; 273-280, 280-281, 301-318.]

On April 14, 1958, appellant Ruth Williams filed a motion to suppress the evidence seized upon the search of her home and premises at 5417½ South Wilton Place, Los Angeles, February 24, 1958, upon the ground that the search warrant upon which the search and seizure were made was void on its face under Federal Rules of Criminal Procedure, Rule 41(e). The motion came on for hearing April 28, 1958, before Honorable William C. Mathes, Judge presiding. At the conclusion of the hearing, the court directed the attorney for the Government to submit a formal order denying the motion. The formal order was

submitted and was filed and entered by the court May 1, 1958. [Tr. pp. 36-38.] The court decided in the formal written order that the search warrant was void on its face and that it "standing alone offered no justification for the search of appellant Williams' residence." [Tr. p. 36, line 21, to p. 37, line 3.]

After holding the search warrant void, the court went on in its order to hold that appellant Williams "was arrested without a warrant of arrest, February 24, 1958, in her residence by state and federal law enforcement officers" [Tr. p. 37, lines 4-7]; that the arrest was lawful in that the search and seizure of the evidence sought to be suppressed was incident to a lawful arrest; and that for these reasons the motion to suppress would be denied. [Tr. p. 37, line 4, to p. 38, line 8.]

Believing that the court had erred in holding that the alleged arrest of Ruth Williams after the wrongful entry into her home without a warrant of arrest was invalid and that the search and seizure of the evidence sought to be suppressed had been wrongfully seized within the meaning of the Federal Rules of Criminal Procedure, Rules 3, 4, 5 and 41, the appellants Williams and Cook moved the court to suppress the evidence seized at Ruth Williams' home and to suppress the alleged confession taken from Cook while he was being illegally detained at the federal narcotic office in the Federal Building in Los Angeles for some two to three hours prior to the time he was booked. [Tr. pp. 41-43.] The motion prayed that the court reconsider paragraphs 4, 5, 6 and 7 of the formal order, entered May 1, 1958 [Tr. p. 37, lines 4-21; pp. 41-43], denying the motion of Ruth Williams to suppress the evidence seized from her home on February 24, 1958, pursuant to the void search warrant and inventory thereon,

and further prayed the court to suppressed the alleged written statement or confession of appellant Cook. [Govt. Ex. 16; Appx. pp. 6-7.] The second motion alleged that the search of Ruth Williams' home and seizure of the evidence therefrom was made incident to a void arrest without a warrant. [Tr. p. 41, line 20, to p. 42, line 2.] The motion came on for hearing before Judge Mathes May 19, 1958, and was disposed of by the following Minute Order: "The Court orders said motion to suppress evidence denied without prejudice." [Tr. p. 60, lines 16-17.]

Appellants shall devote their argument on this point solely to the question of the invalidity of the arrest and the void search and seizure following the illegal arrest, as the search warrant under which the search was made was held by Judge Mathes to be void. Further consideration of the validity of the search warrant would be the presentation to this Court of a moot question.

Appellants Williams and Cook contended before Judge Mathes on the motions to suppress and before Judge Harrison on the renewal of the two motions to suppress, the objections to the receipt in evidence of the paraphernalia seized from Ruth Williams' home and premises, the motion to strike the testimony of the officers and to strike the exhibits, the motion to acquit at the conclusion of the Government's case, and the motion to acquit and in the alternative a motion for new trial, that the entry into Ruth Williams' house and the so-called arrest and search of her premises and the seizure of the evidence alleged to have been done pursuant to this arrest, were all illegal and void within the Fourth Amendment to the Constitution and Rules 3, 4, 5 and 41 of Federal Rules of Criminal Procedure.

Before Judge Mathes, who passed upon the motions to suppress, and which were refused consideration by Judge Harrison on the ground that Judge Mathes has passed upon them, appellants mainly relied upon the following cases:

Johnson v. United States, supra;
McDonald v. United States, supra;
Trupiano v. United States, supra;
Agnello v. United States, supra;
Poldo v. United States, supra;
Work v. United States, supra;
Woods v. United States, supra;
McKnight v. United States, supra.

Appellants also relied upon:

18 U. S. C., Sec. 3109, adopted June 25, 1948;
26 U. S. C., Sec. 7607,[5] approved July 18, 1956;
F. R. C. P., Rules 3, 4, 5, 41.

Taking the Government's version of the facts as true, the holding in *Johnson v. United States, supra,* should

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[5]§7607. The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(1), may—

(1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpenas and summonses issued under the authority of the United States, and

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

end this case in favor of the appellants. Quoting from the *Johnson* case,

> "The Government contends, however, *that this search without warrant must be held valid because incident to an arrest.* This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty. * * *
>
> *"Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do.* An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine the 'right of the people to be secure in their persons, houses, papers and effects,' *and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."* (333 U. S. 15-17, 68 S. Ct. 369-371.)

We see no way to distinguish the *Johnson* case from the case at bar except that our case is a stronger one against the Government than the *Johnson* case. In the *Johnson* case, a detective of the Seattle Police force, with four federal narcotic agents, went to a hotel on a tip by an informer that opium was being used in a room in the hotel occupied by the defendant in that case. The officers, experienced narcotic officers, smelled an odor in the hallway of the hotel which they identified as odors emanating from the smoking of opium. The odor led the officers to

Room 1. The officers knocked on the door and a voice inside asked who was there. The reply was, "Lt. Belland." After some delay and a shuffling noise in the room, the defendant opened the door. The officers said, "I want to talk to you about the opium smell in this room"; the defendant then stepped back and admitted us. Defendant denied that there was any opium smell emanating from the room. The officers then said, "consider yourself under arrest because we are going to search the room." The search turned up opium in the room and smoking apparatus, warm, as having been apparently recently used. This evidence the District Court refused to suppress before trial and admitted over the defendant's objection at the trial. The defendant was convicted and the Court of Appeals for the 9th Circuit affirmed. (162 F. 2d 562.)

The Supreme Court held that there was no excuse for making the search under such circumstances without a search warrant or to arrest the defendant without a warrant of arrest and then to claim that the search and seizure were valid as an incident to an alleged valid arrest. The conviction of the defendant was reversed, the Court saying, at 333 U. S., pages 13-15, 68 Supreme Court, page 369:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to*

a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. *When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.* There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement. *No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear.* But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

"If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."

In *Trupiano v. United States, supra,* which followed the *Johnson* case, it was held that a valid arrest does not necessarily make a search, incident to the arrest without a search warrant, valid. The Supreme Court said in the *Trupiano* case, 334 U. S., at 704, 705, 708, 68 S. Ct., at 1232 and 1234:

> ". . . And since this arrest was valid, the argument is made that the seizure of the contraband open to view at the time of the arrest was also lawful. Reliance is here placed on the long line of cases recognizing that an arresting officer may look around at the time of the arrest and seize those fruits and evidences of crime or those contraband articles which are in plain sight and in his immediate and discernible presence. . . . (Citing cases.)
>
> "We sustain the Government's contention that the arrest of Antoniole was valid. The federal agents had more than adequate cause, based upon the information supplied by Nilsen, to suspect that Antoniole was engaged in felonious activities on the farm premises. Acting on that suspicion, the agents went to the farm and entered onto the premises with the consent of Kell, the owner. There Antoniole was seen through an open doorway by one of the agents to be operating an illegal still, an act felonious in nature. His arrest was therefore valid on the theory that he was committing a felony in the discernible presence of an agent of the Alcohol Tax Unit, a peace officer of the United States. The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances. Warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime. . . .

". . . *But we cannot agree that the seizure of the contraband property was made in conformity with the requirements of the Fourth Amendment.* It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. . . . (Citing cases.) . . . This rule rests upon the *desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. United States v. Lefkowitz, supra,* 285 U. S. at page 464, 52 S. Ct. at page 423. In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement. . . .

"A search or seizure without a warant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant. *Carroll v. United States, supra,* 267 U. S. at page 158, 45 S. Ct. at page 287. *Otherwise the exception swallows the general principle, making a search warant completely unnecessary wherever there is a lawful arrest."*

It does not matter what an unreasonable search and seizure turns up, as the guarantee of the Fourth Amendment to the Constitution protects the privacy of both the innocent and guilty. (*McDonald v. United States, supra,* 335 U. S. 453, 69 S. Ct. 192.) In the *McDonald* case, the Government sought to place the lawfulness of the search on the lawfulness of the arrest and so justify the search and seizure without a warrant. That, the Supreme Court said, could not be done. The Court went on to say, at 335 U. S. 455-456, 69 S. Ct. 193:

> "Here, as in Johnson v. United States and Trupiano v. United States, *the defendant was not fleeing or seeking to escape. Officers were there to apprehend petitioners in case they tried to leave.* . . .
>
> "We are not dealing with formalities. The presence of a search warrant serves a high function. *Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.* And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

The Supreme Court decided in the *McDonald* case that the motion to suppress the evidence seized should have been granted and that the admission at the trial of the evidence seized over the objection of the defendant McDonald, required that the convictions of him and his co-defendants be reversed although his co-defendants, tried jointly with McDonald, took no appeal from their judgments of conviction. This ruling is particularly applicable to the appellant Cook, who was tried jointly with appellant Williams.

The case of *Work v. United States, supra,* is directly in point. In the *Work* case, the Court of Appeals for the District of Columbia reversed the conviction of a woman of whom they had knowledge that she was a user of and possessor of narcotics. The officers went to defendant's home without a search warrant and opened the door and entered a few steps after receiving no answer to a knock on the door. The defendant was arrested and a search was made of her home. The appellant, in that case, walked past the officers, making some comment about their having opened the door. She went out of the open door through which the officers had entered, walked a few steps across the porch, went down another few steps and turned down another step or two to an area under the porch, where she was seen by the officers to make certain motions as if putting something in a trash can located under the porch. The trash can was examined and a container was taken out of the can, which held narcotics. The Court reversed the woman's conviction, holding that the entry into her home was unlawful and that the evidence should have been suppressed, citing *Agnello v. United States, supra.* The cases cited and quoted from above would seem to be conclusive of the unlawfulness of

the entry into appellant Williams' home and the seizure of the alleged narcotic out of the community trash can serving five units of the entire flat and rear of the converted garage living quarters of Mrs. Williams.

There are three cases decided by the Supreme Court of the United States subsequent to the order of the lower court, Judge Harrison, denying the separate motions of appellants Williams and Cook for acquittal, and motions in the alternative for a new trial. [Tr. pp. 83-86, 87-88.] These motions of the appellants were denied June 13, 1958. [Tr. p. 98.] Those three cases just mentioned which we contend are directly in point in favor of the appellants Williams and Cook, and are determinative of these appeals in their favor, are: *Miller v. United States,* decided June 23, 1958, 357 U. S. 301, 78 S. Ct. 1190; *Giordenello v. United States,* decided June 30, 1958, 357 U. S. 480, 78 S. Ct. 1245; *Jones v. United States,* decided June 30, 1958, 357 U. S. 493, 78 S. Ct. 1253.

In *Miller v. United States,* a prosecution for violation of the federal narcotic laws (21 U. S. C., Sec. 174), it was held that the police were not entitled to enter a dwelling even though in response to an inquiry by the defendant occupant, "Who is there?", the police replied, "Police." Such colloquy was held insufficient to meet the requirements of Section 3109, 18 U. S. C., and that a motion to suppress the evidence seized should have been granted and that its admission at the trial over the objection of the defendant required that appellant's conviction be reversed.

In the *Giordenello* case, the principle was reaffirmed, that the language of the Fourth Amendment, *that no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the person or*

thing to be seized, applies to warrants of arrest as well as to search warrants. (357 U. S. 486, 78 S. Ct. 1250.) In that case, the officers procured a warrant of arrest for petitioner and arrested him on the street as he was coming out of a residence, not his own. The officers had shadowed petitioner from his own home to the place where he was arrested. His person was searched and heroin found on him. The warrant for petitioner's arrest was issued by a United States commissioner on the complaint of a federal officer that Giordenello had received and concealed some narcotic drugs after knowledge of its illegal importation. The Supreme Court held that the affidavit for the warrant of arrest was insufficient and the warrant void, as the affidavit did not contain any affirmative allegations that the complaining officer spoke with personal knowledge of the matters stated in the affidavit. Giordenello's conviction was reversed, the Court holding that since the arresting officer had no search warrant, the heroin seized from the person of Giordenello, at the time of his arrest, was admissible in evidence only if its seizure was incident to a lawful arrest. The evidence seized was not admissible as the arrest was unlawful because the affidavit for the warrant of arrest was insufficient to establish probable cause. See also a like ruling in *Papani v. United States* (C. A. 9, 1936), 84 F. 2d 160.

The Government contended in the *Giordenello* case that the arrest was controlled by the law of Texas, which permits an arrest without a warrant. The Supreme Court declined to accept the contention, citing *United States v. Di Re, supra,* and *Johnson v. United States, supra.* The arrest was held invalid under the Federal Constitution and Federal Rules of Criminal Procedure as agent Finley, who participated in the arrest, search and seizure, was a

federal narcotic officer and that his participation made the operation a federal one. That rule has been the law of the Ninth Circuit for many years. (*Baumboy v. United States* (C. A. 9, 1928), 24 F. 2d 512; *Brown v. United States* (C. A. 9, 1925), 4 F. 2d 246; see also *Byars v. United States, supra; Lustig v. United States, supra.*) Congress conferred the power to make arrests on federal narcotic officers in 1956. (26 U. S. C., Sec. 7607.)

In *Jones v. United States, supra,* the Supreme Court held, in accord with the *well established doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling house, cannot of itself justify a search of the dwelling without a warrant.* The search of the dwelling in the *Jones* case was claimed by the Government to have been made incident to a valid arrest. The Court reversed the conviction, holding, in affect, that *where a search warrant is required for the search of a home, there can be no such thing as entry into the home and the search of it without a search warrant* whether or not the search is incident to a valid arrest. The Court held to the fast rule that a search of *a dwelling house is never valid unless made upon a search warrant which has been issued by a magistrate upon a proper showing of probable cause.*

In *Miller v. United States, supra,* federal and state officers went to petitioner's apartment in an apartment house where one of the state officers knocked on the door of the apartment. A person from within inquired, "Who's there?" The officers replied, "Police." The petitioner opened the door to the length of a door chain and asked what the officers were doing there. The petitioner then attempted to close the door. Without saying anything, the officers put their hands inside the door, pulled the chain

off and entered. The petitioner was arrested and $66 in marked currency was found in the house which had been paid out that morning by the officers to another person, an informer, to purchase narcotics. *The marked currency was admitted in evidence on the Government's contention that it was seized as incident to a lawful arrest. The Court held that the officers were without right to pull the chain off the door and enter the apartment and that the arrest of the petitioner was unlawful and that the admission in evidence of the marked money, over the objection of the petitioner, required a reversal of petitioner's conviction.*

POINT II.

The Erroneous Admission in Evidence, Over the Objection of Appellants, of the Paraphernalia Seized From Appellant Ruth Williams' Home Was Prejudicial Error Requiring the Reversal of Appellants' Convictions.

The articles seized in Ruth Williams' home by federal narcotic officer Richards, pursuant to the void search warrant, were itemized by him on the return of the warrant. (Appx. p. 5.) The return shows that officer Richards listed the articles seized in 14 different items, consisting of numerous articles, the number of which is difficult to determine from the inventory. The Government made a blanket offer of these several items as Exhibits 7, 7-A, 7-B, 8, 8-A, 8-B, 8-C, 8-D and 9. In addition to the objection to the articles that they had been illegally seized, counsel for appellants objected to the admission in evidence of the offered exhibits on the grounds, first, that

they were incompetent, irrelevant and immaterial and, secondly, that no proper foundation had been laid for their admission. The objection was overruled and the court admitted the exhibits in evidence. [Rep. Tr. pp. 382-386.]

Appellants contend that the admission of the conglomerate paraphernalia such as cans of milk sugar, corn starch, a half box of .32 caliber bullets, some rolls of scotch tape, some empty milk sugar cans, a stapling machine with a supply of staples, a shiek box with wrappings of six contraceptives, a paper tablet with certain markings, and things of the sort which were included in the exhibits, does, above all else, require a reversal of this case within the meaning of *Kremen v. United States* (1957), 353 U. S. 346, 77 S. Ct. 828, where the Supreme Court held that the admission of such miscellaneous articles voided the conviction. The Court said, 353 U. S., page 348, 77 S. Ct., page 829 of the opinion that:

> "* * * The majority of the Court are agreed that objections to the validity of the search and seizure were adequately raised and preserved. The seizure of the entire contents of the house and its removal some two hundred miles away to the F. B. I. offices for the purpose of examination are beyond the sanction of any of our cases. While the evidence seized from the persons of the petitioners might have been legally admissible, *the introduction against each of petitioners of some items seized in the house in the manner aforesaid rendered the guilty* verdicts illegal."

POINT III.

The United States Commissioner's File Demonstrates That the Testimony of the Officers, Relating the Circumstances of the Alleged Arrest of Appellant Williams and the Search of Her Home as an Incident to That Arrest, Is Untrue.

Prior to the time of the search of Ruth Williams' home by federal and state narcotic officers February 24, 1958, one Justin B. Burley and Malcolm P. Richards, a federal narcotic agent, appeared before United States Commissioner Theodore Hocke and made affidavits for a search warrant of the premises known as "5417½ So. Wilton." (Appx. pp. 1-3.) Commissioner Hocke forthwith issued a purported search warrant and delivered it to federal narcotic officer Malcolm P. Richards. (Appx. p. 4.) The return on the purported search warrant to which Malcolm P. Richards made affidavit before Commissioner Hocke on February 25, 1958, contains the following sworn statements of Richards (Appx. p. 5):

> "I received the attached search warrant 2/24, 1958, and have executed it as follows:
>
> "On 2/24, 1958 at 3:00 o'clock P.M., I searched ~~(the person)~~
> (the premises) described in the warrant and
>
> "I left a copy of the warrant with Mrs. Ruth J. Williams (name of person searched or owner at place of search) together with a receipt for the items seized.
>
> "The following is an inventory of property taken pursuant to the warrant: (here follows the inventory of the property seized)
>
> * * * * * * * *
>
> "This inventory was made in the presence of Agent Wm. Gilkey, Sgt. A. F. Landry, Deputy

Sheriff and William Farrington & Arthur Gillette, Deputies.

"I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ MALCOLM P. RICHARDS

"Subscribed and sworn to before me this 25th day of February, 1958.

/s/ THEODORE HOCKE
United States Commissioner."

(Appx. pp. 4-5.)

On February 25, the day after the search and seizure, Malcolm Richards appeared before Commissioner Hocke and swore to a complaint against appellants Williams and Cook, charging them with the sale and facilitation of the sale of heroin. [Tr. p. 1.] Obviuosly, the complaint was based solely on the statement or confession (Appx. pp. 6-7) of appellant Cook, taken from him by federal agent Richards, while Cook was being detained at the federal narcotic office in the Federal Building prior to the time he was booked in the County Jail. As already shown, from the officers' version of what happened, the officers left Ruth Williams' home about 5:00 o'clock on the afternoon of February 24, taking appellants Williams and Cook with them. Appellants were taken to the narcotics' office in the Federal Building at Los Angeles and detained there for approximately three hours, when they were booked in the Los Angeles County Jail on suspicion of trafficking in narcotics. The Los Angeles County Jail is just across Spring Street from the Federal Building and westerly from it.

The next morning, February 25, after the issuance of the complaint by Commissioner Hocke on federal narcotic

officer Richards' affidavit, Commissioner Hocke issued a warrant for the arrest of appellants Williams and Cook. The warrant was directed to the United States Marshal, or other authorized officer. The return on the warrant indicates that someone went over to the county jail and brought appellants Williams and Cook to the Federal Building to Commissioner Hocke's office, where they were arrested by the United States Marshal, February 25, 1958. [Tr. p. 2.] At the time of the arrest, Commissioner Hocke issued separate temporary commitments directed to the United States Marshal for appellant Williams and appellant Cook. The marshal acknowledged receipt of the commitments and made a return stating that he had committed each of the defendants to the Los Angeles County Jail. [Tr. pp. 3-6.]

Mere reference to the commissioner's record demonstates that the search of Ruth Williams' home was made under the void search warrant and not as an incident to the alleged arrest without a warrant, as the officers testified. The appellants were not arrested until some 18 hours after the search had been completed, and then on a warrant issued on a complaint, which complaint was obviously based solely on what appellant Cook had confessed to Malcolm Richards in the statement given while he was being detained by Richards in the federal narcotic office prior to the time that he was booked in the Los Angeles County Jail.

The only possible explanation of the untruthful testimony given by the officers is that they learned, from the first motion of Ruth Williams, filed April 14, 1958, to suppress the seized evidence, that the search warrant, under which her home was searched and the evidence inventoried in the search warrant was seized, was void on its face

because of the failure of the purported search warrant to comply with the provisions of Rule 41 of the Federal Rules of Criminal Procedure. Caught in this dilemma the officers cooked up the story of the arrest upon their entry into Ruth Williams' home in order to extricate themselves from that illegal entry, which they obviously had made under a void search warrant, and under which void search warrant they seized the evidence inventoried on the return of the search warrant.

It was pointed out by the Supreme Court, in *Miller v. United States, supra,* at page 312, 78 S. Ct. at page 1197, quoting from *United States v. Di Re, supra:*

> "We have had frequent occasions to point out that *a search is not to be made legal by what it turns up. In law, it is good or bad when it starts and does not change character from its success."*

The present case falls under the ban of the Supreme Court established in *McDonald v. United States, supra,* where Mr. Justice Douglas, speaking for the Court, held that *a valid search warrant in all cases is necessary for the search of a home, as the Fourth Amendment has interposed a magistrate between the citizen and the police,* as history has proved that *"the police cannot be trusted."* (335 U. S. pp. 455-456, 69 S. Ct. p. 193.)

POINT IV.

The Failure of the Officers to Disclose the Identity of the Informer Requires a Reversal of Appellants' Convictions.

The informer in this case participated in the offense. For that reason, Judge Mathes required the officers to name him. The officers named "Jesse Thomas." [Rep. Tr. pp. 287-290.] The officers consistently denied they knew where "Jesse Thomas" was at the time of the trial,

or where he at any time had lived, and testified that no effort had been made to find him; nor had he been subpoenaed by the Government as a witness. [Rep. Tr. pp. 506-507, 551, 556, 558.] As to the identity of the informer, the officers would go no further than to say, He is known to me as "Jesse Thomas." [Rep. Tr. pp. 287-290.] The vacillation of the officers brings this case squarely within *Roviaro v. United States* (1957), 353 U. S. 53, 77 S. Ct. 623. Naming the informer as "Jesse Thomas" cannot be distinguished from what the officers in the *Roviaro* case did when they named the informer as "John Doe." The indifference of the officers to the identity of "Jesse Thomas" who, according to their testimony, was a participant in the offenses charged in the indictment, requires a reversal of the convictions of appellants under the ruling in the *Roviaro* case, *People v. McShann* (1958), 50 Cal. 2d 802, and *Priestley v. Superior Court,* 50 Cal. 2d 812. Our position seems to have been made impregnable by the following quotation from *Roviaro v. United States* at page 61 of 353 U. S. and page 628 of 77 Supreme Court:

> ". . . Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen *where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause.* In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication."

It is interesting to note that in the two leading informer cases in California, decided October 1, 1958, *People v. McShann,* 50 Cal. 2d 802 and *Priestley v. Superior Court,* 50 Cal. 2d 812, the Supreme Court of California relies

upon the *Roviaro* case in establishing that in circumstances similar to those present here, *the identity of the informer must be revealed or the prosecution must suffer a dismissal of the case.*

POINT V.

The Evidence Was Insufficient to Sustain the Conviction of Either Appellant on Any One of the Counts of the Indictment on Which Each One Was Convicted. There Was No Evidence Introduced by the Government to Show a Conspiracy or to Show That Any Offense Was Committed Other Than the Statement or Confession of Cook (Appx. pp. 6-7) Which Was Admitted in Evidence as to Appellant Cook Only.

The motion to acquit made by each of appellants at the close of the Government's case, and before the case was reopened on motion of the Government to allow the Government to present the alleged confession of Cook (Appx. pp. 6-7), should have been granted. Upon denying the motion to acquit made at the close of the Government's case, the Court said:

> "I will agree the *evidence against Williams and Cook is much weaker than it is against the other defendants* but I think it is sufficient and I think it would be an abuse of my prerogative to grant a judgment of acquittal as to those counts. *I think it is a jury question.* If the jury convicts him *it would be a question then to be determined on motion for new trial or judgment of acquittal after a verdict, but I think it is a question that should be submitted to the jury.*" [Rep. Tr. p. 580.]

Appellants' separate motions to acquit were denied.

The United States Attorney, taking note of the Court's statement, and to save the Government's weak case against appellants, made a motion to reopen, for the purpose of offering the alleged confession of Cook into evidence. The motion was granted. [Rep. Tr. p. 646; Appx. pp. 6-7]. The jury was then excused, so that the admissibility of the confession could be determined out of the presence of the jury.

Federal narcotic officer Malcolm Richards was called and testified that he had interviewed appellant Cook at the federal narcotic office in the Federal Building, on February 24, from around 6:00 o'clock to 8:00 o'clock in the evening, and took the statement from him [Govt. Ex. 16; Appx. pp. 6-7], after which Cook was booked in the Los Angeles County Jail. No charges were filed against Cook until the next morning. Agent Richards testified the usual procedure is to take persons picked up for narcotics offenses to the narcotic office in the Federal Building, question them and take a statment from them if they are willing to give statements, and then book them in the county jail. This was the procedure followed in Cook's case. [Rep. Tr. pp. 687-782.] After the testimony of Richards, the Court admitted the confession of appellant Fred Cook as against Cook only. The jury was recalled and Cook's confession [Govt. Ex. 16] was read to the jury. [Rep. Tr. pp. 728-731.]

Government Exhibit 16 (Appx. pp. 6-7) was admitted over the objection of the appellants, made on the ground that the Government did not show that the statement was taken in compliance with Rule 5 of the Federal Rules of Criminal Procedure.

At this point, we digress to say that there is not a word of testimony in the record which tends to establish

a conspiracy. Thus, the Court's instructions on conspiracy which indicated there was a conspiracy, tended to confuse the jury and were prejudicial to both appellants. Nothing was shown by the prosecution to establish the conspiracy charged more than a mere suspicion. There is not one word of testimony in the record that Ruth Williams and Eddie Jewel Bryant ever knew or communicated with each other, directly or indirectly. The evidence is that Ruth Williams never at any time knew Eddie Jewel Bryant. There is some testimony connecting Ruth Williams with Juanita Smith, but Juanita Smith was found *not* to be a party to the conspiracy, *as she was acquitted.* Such evidence, which raises a mere suspicion of guilt was insufficient to convict the appellants on any of the counts upon which they were convicted.

Ong Way Jon v. United States (C. A. 9, 1957), 245 F. 2d 392;

Evans v. United States (C. A. 9, 1958), 257 F. 2d 121;

Robinson v. United States (C. A. 9, 1959), 262 F. 2d 645;

Krulewitch v. United States (1949), 336 U. S. 440, 69 S. Ct. 716;

Cash v. Culver (1959), 79 S. Ct. 432.

It is obvious from a mere reading of Cook's confession that its effect on the jury was highly prejudicial to the appellants. Juanita Smith, who was not mentioned in the confession and of whom the Court said the case, before the confession was admitted in evidence, was stronger against her than the weak case made against Williams and Cook, was acquitted. Counsel for appellants do not feel it worthwhile to consider further the evidence on Counts Five, Six and Seven. There just is not any admissible

or probative evidence in the record to sustain a conviction on any one of those counts of either appellant.

Count Eight, the conspiracy count, is obviously founded on Cook's confession, as the allegations of the conspiracy in that count paraphrase Cook's confession. [Tr. p. 16.]

As shown above, from the officers' testimony, Cook was picked up at Ruth Williams' home, 5417½ South Wilton Place, Los Angeles, California, in the afternoon of February 24, 1958. No complaint was filed against him and no warrant of arrest was issued or served on him until the forenoon of the following day, February 25, when the warrant was issued on a complaint sworn to by federal narcotic officer Malcolm P. Richards and served upon Cook in the commissioner's office by the United States Marshal. From these facts, it appears that Cook *was illegally detained* by the federal officers from the time he was picked up at 3:00 o'clock in the afternoon of February 24 until he was brought before the commissioner in the forenoon of the following day. During that period of some 18 hours, federal narcotic officer Malcolm P. Richards and his fellow officers removed Cook from appellant Williams' home at around 5:00 p.m. on February 24. Cook was first taken to the federal narcotic office in the Federal Building and held there for some three hours before he was booked in the Los Angeles County Jail. The officers took advantage of Cook's illegal detention in the federal narcotic office to extract from him the statement or confession, Government's Exhibit 16, reproduced in full on pages 6 and 7 of the Appendix.

We believe these facts bring Cook's confession squarely within *Mallory v. United States* (1957), 354 U. S. 449, 77 S. Ct. 1356, where the Supreme Court held that the detention of a defendant, in circumstances completely

analogous to the system used by the federal officers here in Cook's case, rendered a confession extracted from the defendant in such circumstances inadmissible as having been taken in violation of Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure. The Court said, at pages 454-455 of the opinion, 77 Supreme Court pages 1359-1360, reversing the conviction of Mallory:

> "The scheme for initiating a federal prosecution is plainly defined. *The police may not arrest upon mere suspicion but only on 'probable cause.' The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined.* The arrested person may, of course, be 'booked' by the police. *But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.*
>
> "The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. *But the delay must not be of a nature to give opportunity for the extraction of a confession.*"

Appellants respectfully assert that the conviction of each of them should be reversed and the indictment dismissed.

Respectfully submitted,

Wm. H. Neblett,

E. W. Miller,

Attorneys for Appellants.

APPENDIX.

Defendant Williams' Exhibit A on Motion to Suppress Evidence.

Form A. O. 106

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF CALIFORNIA
Central Division

Commissioner's Docket No. 23
Case No. 235

UNITED STATES OF AMERICA
v
5417½ S. Wilton
.....
.....

AFFIDAVIT FOR SEARCH WARRANT

BEFORE .....
Name of Commissioner

The undersigned being duly sworn deposes and says:

That he (has reason to believe) ~~(is positive)~~ that ~~(on the person of)~~ (on the premises known as)

5417½ S. Wilton.....

in the Southern District of California, there is now being concealed certain property, namely heroin.....
here describe property

which are in violation of 21 U.S.C. 174.....
here give alleged grounds for search and seizure

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

See attached affidavits

JUSTIN B. BURLEY
Signature of Affiant.
MALCOLM P. RICHARDS
Official Title, if any.
Narcotic Agent

Sworn to before me, and subscribed in my presence, Feb. 24, 1958.

THEODORE HOCKE
United States Commissioner

AFFIDAVIT

On February 21, 1958, at approximately 10:20 A.M., affiant met and conversed with Eddie Jewel Bryant. Affiant told Bryant that he wanted to purchase an ounce of heroin from Bryant. Bryant told affiant that this was agreeable and affiant handed $250 to Bryant. And at approximately 11:10 A.M., Bryant and affiant went to vicinity of 54th and Van Ness. Affiant departed from Bryant's 1954 Oldsmobile. Bryant returned to said vicinity at approximately 11:40 A.M. and handed 390 grains of heroin to affiant.

Justin Burley

JUSTIN BURLEY

Date 2-24-58

Subscribed and sworn to before me this..... day of Feb. 24, 1958, ...19

THEODORE HOCKE

United States Commissioner for the Southern District of California, at Los Angeles.

AFFIDAVIT

On February 21, 1958 at approximately 11:15 A.M., affiant saw Eddie Jewel Bryant park an automobile in front of 5417½ South Wilton Place and enter said residence. At 11:35 A.M., affiant saw Bryant leave said residence and enter her 1954 Oldsmobile and drive away.

Malcolm P. Richards
MALCOLM P. RICHARDS

Subscribed and sworn to before me this ..... day of Feb. 24, 1958, ...19

THEODORE HOCKE
United States Commissioner for the Southern District of California, at Los Angeles.

Defendant Williams' Exhibit B on Motion to Suppress Evidence.

Form A. O. 93 (Revised Oct. 1953) Search Warran

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF CALIFORNIA
Central Division

Commissioner's Docket No. 23
Case No. 230

UNITED STATES OF AMERICA
v
5417½ S. Wilton
.....
.....

SEARCH WARRANT

To

Affidavit having been made before me by that he (has reason to believe) (is positive) that ~~(on the person of)~~ (on the premises known as) 5417½ S. Wilton in the Southern District of California there is now being concealed certain property, namely heroin.....
here describe property
which is concealed in violation of 21 U.S.C. 174.....
here give alleged grounds for search and seizure
and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the ~~(person)~~ (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the ~~(person)~~ (place) named for the property specified, serving this warrant and making the search (in the daytime) ~~(at any time in the day or night)~~ and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 24th day of Feb. 24, 1958.

THEODORE HOCKE,

RETURN

"I received the attached search warrant 2/24, 1958, and have executed it as follows:

"On 2/24, 1958 at 3:00 o'clock P.M., I searched (~~the person~~ / the premises) described in the warrant and

"I left a copy of the warrant with Mrs. Ruth J. Williams together
Name of person searched or owner or "at the place of search"
with a receipt for the items seized.

"The following is an inventory of property taken pursuant to the warrant:

1 small bottle of milk sugar (full)
1 " " " corn starch (½ full)
1 box .32 automatic bullets
1 " .30-.30 shells (½ full)
$15.00 marked Official Advance Fund; (1 $10.00 & 1-$5.00)
4 rolls Scotch Tape
(2 Empty Milk sugar cans
(1 Milk sugar can containing plastic bag w/small brn
In (envelope w/alleged narcotics—heroin.
Yard (1 can containing 4 small brn envelopes w/envelopes
(w/alleged narcotics—heroin
1 stapling machine w/staples
1 "Sheik" box w/wrappings of 6 contraceptives
1 paper tablet w/markings

"This inventory was made in the presence of Agent Wm. Gilkey, Sgt. A. F. Landry, Deputy Sheriff and William Farrington & Arthur Gillette, Deputies.

"I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

MALCOLM P. RICHARDS

Subscribed and sworn to and returned before me this 25th day of February, 1958.

THEODORE HOCKE
United States Commissioner.

GOVERNMENT'S EXHIBIT 16.

Statement of Fred Cook, Jr., Made in the Office of the Bureau of Narcotics on February 24th 1958 Statement Typed by Narcotic Agent M. P. Richards—Witnessed by Agent Gilkey and Sgt. Algy F. Landry.

Q. Fred Cook, as you know we are Narcotic Officers and we wish you to tell us about your activity and knowledge of the narcotic traffic, particularly relative Ruth Williams. But, first, we wish to advise you of your Constitutional rights in that you are entitled to a lawyer and that you do not have to answer all questions and anything you do say can and will be used against you in the event of prosecution. Do you understand this?

A. Yes, I understand.

Q. What relation is Ruth Williams to you?

A. She is my aunt.

Q. How long have you known her?

A. All my life.

Q. Did you know that she was dealing in narcotic drugs?

A. Not until today.

Q. Have you ever delivered any package to anyone for Ruth Williams?

A. Yes; the other day—about Saturday I think she gave me a package to deliver to a woman named Jewel who lives at 4015 Kansas Street. Mrs. Williams told me to take this package and give it to Jewel and Jewel would give me $100.00.

Q. Did you take the package to Jewel and did you receive any money?

A. Yes, Jewel gave me $100.00 and I took it back and gave it to Mrs. Williams.

Q. Tell me in your own words what you did today after you first arrived at Mrs. Williams' residence.

A. About 8:30 AM I got to her house. I washed some dishes and I dumped the trash. I went to the bank on 48th & Vermont and deposited a check for Mrs. Williams. I returned to her house and I was there for a short while after which she told me that she had a package for me to deliver. I asked her where and she replied the same place I went the other day, over on Kansas. She also told me to pick up some money from the woman at that address; also that I should take a couple dresses and blouses

and bring them back; that everything would be allright. She then gave me three rubber condoms and I left the house, entered my car and went to Kansas, number 4015. I knocked on the door and this woman Jewel opened the door and I entered. I gave Jewel the three rubber condoms and Jewel told me that all of it was not there. I told her I did not know anything about it; that she should call Ruth. She made a call and then she told me that everything was allright and for me to come back as soon as I can. Jewel then gave me a large stack of bills and told me to give it to Ruth. I left the house and returned to Ruth's house. I gave Ruth the stack of money and she gave me three more rubber condoms; and told me to take it back to Jewel; that she had made a mistake. I again took the three condoms which held some white powder back to Jewel and gave them to Jewel. I returned to Ruth's house. At that time Ruth told me she was going to pay me $10.00 to pay on my doctor's bill. She never did. I was later arrested by the officers.

I have read the foregoing statement and it is the truth to the best of my knowledge and belief. I have not been made any promises or have any threats been made to me for giving this statement.

A. F. Landry

M. P. Richards

Fred Cook Jr.

Wm. C. Gilkey

No. 16256

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee.

vs.

RUTH JOHNSON WILLIAMS and FRED COOK, JR.,

Appellants.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

RULES

No. 16256

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee.

vs.

RUTH JOHNSON WILLIAMS and FRED COOK, JR.,

Appellants.

APPELLEE'S BRIEF.

I.
JURISDICTION.

On March 12, 1958, appellants, along with Eddie Jewel Bryant and Juanita Smith, were indicted by the Federal Grand Jury in and for the Southern District of California for selling, receiving, concealing, and transporting a narcotic drug, heroin, and for conspiring to do the same in violation of 21 U. S. C. 174 and 18 U. S. C. 371.

All the defendants were arraigned, and after the pretrial motions to suppress evidence, to appoint a psychiatrist, and to obtain a bill of particulars were ruled upon, and after all of the defendants had entered their plea of not guilty, the defendants were tried by a jury in the United States District Court for the Southern District of California, Central Division, before the Honorable Ben

Harrison. After six trial days the jury, on May 28, 1958, found each of the appellants guilty as charged. On June 13, 1958, United States District Judge Ben Harrison sentenced appellant Williams to a total of ten years imprisonment and $5,000 fine and sentenced appellant Cook to a total of five years imprisonment.

The District Court had jurisdiction of the cause of action under 21 U. S. C. 174, 18 U. S. C. 371, and 18 U. S. C. 3231. The jurisdiction of this Court is invoked under 28 U. S. C. 1291, 1294(1).

II.
STATUTES INVOLVED.

The indictment charges violations of Title 21, U. S. C., Section 174, and Title 18, U. S. C., Section 371, which statutes are quoted below:

Title 21, U. S. C., Section 174:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954."

Title 18, U. S. C., Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined no more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

III.
STATEMENT OF THE CASE.

On February 24, 1958, United States Commissioner Theodore Hocke, Los Angeles, California, issued a search warrant to an agent of the Federal Bureau of Narcotics authorizing a search of 5417½ South Wilton. [Tr. pp. 7-10.]*

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*"Tr." stands for the Transcript of Record. "R. Tr." stands for the Reporter's Transcript of Proceedings.

On February 24, 1958, appellants, along with two others, were arrested, and 5417½ South Wilton was searched. [R. Tr. pp. 272, 277, 278, 280, 316, 347.]

On February 25, 1958, complaints were filed before United States Commissioner Theodore Hocke charging each of the appellants with the sale and facilitation of the sale of approximately three ounces of heroin; the appellants were arraigned before the Commissioner and committed by the Commissioner into the custody of the United States Marshal. [Tr. pp. 1-6.] Federal Narcotics Agent Malcolm Richards filed with the same United States Commissioner the executed return of the search warrant. [Tr. 8.]

On March 12, 1958, the Federal Grand Jury in and for the Southern District of California returned an eight-count indictment against appellants Ruth Johnson Williams and Fred Cook, Jr., and Eddie Jewel Bryant and Juanita Smith charging in substance as follows:

Count One: On February 14, 1958, Bryant sold 403 grains of heroin to Justin Burley;

Count Two: On February 17, 1958, Smith and Bryant sold 303 grains of heroin to Justin Burley;

Count Three: On February 17, 1958, Smith received, concealed, and facilitated the transportation of 303 grains of heroin;

Count Four: On February 21, 1958, Bryant received, concealed, and facilitated the transportation of 390 grains of heroin;

Count Five: On February 24, 1958, Williams, Bryant, and Cook sold 2 ounces, 339 grains of heroin to Justin Burley;

Count Six: On February 24, 1958, Williams, Bryant and Cook received, concealed, and facilitated the transportation of 2 ounces, 339 grains of heroin;

Count Seven: On February 24, 1958, Williams received, concealed, and facilitated the concealment of 3 ounces, 404 grains of heroin;

Count Eight: Beginning on February 14, 1958, and continuing to the date of the indictment, Williams, Smith, Bryant, and Cook conspired to sell, receive, conceal, and facilitate the transportation and concealment of heroin; overt acts duplicating Counts One, Three, Six, and Seven) were set forth in the indictment. [Tr. pp. 12-17.]

On March 17, 1958, defendant Eddie Jewel Bryant (the only defendant still in custody at that time) was arraigned on the indictment before Honorable Wm. M. Byrne.

On March 31, 1958, appellants and defendant Smith were arraigned before Honorable Wm. M. Byrne. Appellant Cook, through his attorney, Wm. H. Neblett, moved the court for the appointment of a psychiatrist to examine Cook, and the court granted this motion. [Tr. p. 18.]

On April 21, 1958, all four defendants, including the appellants, plead not guilty to the indictment before Honorable Thurmond Clarke, and the motions to suppress filed by appellants, the hearing on appellant Cook's sanity, and the motions of Smith and Bryant were continued to May 27, 1958. [Tr. p. 30.]

On April 22, 1958, Judge Clarke vacated the date set for hearing the motions and ordered that they be heard before Honorable Peirson M. Hall on April 24, 1958. [Tr.

p. 31.] This was done pursuant to Chapter II, Rule III (8) and (9), Local Rules, Southern District, California.

On April 24, 1958, defendant Bryant plead guilty to Counts Five and Eight of the indictment before Judge Clarke; Honorable Peirson M. Hall transferred the case for all further proceedings to Honorable Wm. C. Mathes. [Tr. p. 32.]

On April 28, 1958, before Judge Mathes, defendant Smith's motion for a bill of particulars was withdrawn; the report of the psychiatrist who had examined appellant Cook was filed, and the court found that Cook was competent to stand trial; evidence was taken on appellant Williams' motion to suppress evidence, and the motion was denied; the case was set for jury trial. [Tr. pp. 33-38; R. Tr. pp. 248-368.]

On May 1, 1958, before Judge Mathes, defendant Bryant withdrew her plea of guilty to Counts Five and Eight of the indictment and plead not guilty; the court denied the Government's motion to increase the bail of all four defendants. [Tr. pp. 39-40.]

On May 19, 1958, Judge Mathes again denied appellants' motion to suppress evidence. [Tr. p. 60.]

On May 20, 1958, Judge Mathes ordered the case transferred for trial to Honorable Ben Harrison. [Tr. p. 61.]

On May 20, 1958, before Judge Harrison, a jury was impaneled and trial commenced. [Tr. pp. 62-65.] The trial continued on May 21, 22, 23, 27 and 28. [Tr. pp. 66-80.]

On May 28, 1958, the jury returned a verdict in which it found:

1. Appellant Williams guilty on all counts charged: 5, 6, 7 and 8. [Tr. p. 81.]
2. Appellant Cook guilty on all counts charged: 5, 6 and 8. [Tr. p. 82.]
3. Defendant Bryant guilty on all counts charged 1, 2, 4, 5, 6 and 8.
4. Defendant Smith not guilty on any counts charged: 2, 3 and 8.

On June 2, 1958, appellants Williams and Cook moved the trial court for a judgment of acquittal or, in the alternative, for a new trial. [Tr. pp. 83-89.]

On June 9, 1959, before Judge Harrison, appellants' motions for new trials or judgments of acquittal were heard and continued; the Government filed an information alleging that appellant Williams had a prior federal narcotic conviction; Williams was arraigned on this information and admitted its truth. [Tr. p. 91.]

On June 13, 1958, Judge Harrison heard further argument on appellants' motions for new trials or judgments of acquittal, and denied said motions. Judge Harrison sentenced appellant Williams to ten years and $5,000 on Counts 5, 6, and 8, and five years on Count 8, to begin and run concurrently each with the other, for a total of ten years and $5,000. Judge Harrison sentenced appellant Cook to five years on Counts 5, 6, and 8 to begin and run concurrently each with the other, for a total of five years. [Tr. pp. 93-101.]

On June 17, 1958, appellants filed a notice of appeal, and Judge Harrison granted bail pending appeal. [Tr. pp. 102-104.]

On June 25, 1958, appellants filed in the District Court their Designation of Contents of Record on Appeal in which the entire record was designated. [Tr. pp. 105-110.]

On January 23, 1959, appellants filed in the United States Court of Appeals for the Ninth Circuit their statement of points upon which they intend to rely in this appeal. Although 13 different points were specified, they may be generally grouped as follows:

1. The search and seizure at 5417½ South Wilton Place, Los Angeles, California, was illegal (Points I-V, VII);
2. Appellant Cook's confession was inadmissible (Point VI);
3. The trial court should have granted the appellants' motions for judgments of acquittal or for new trials (Points VIII, XIII);
4. The trial court should not have given any instructions on conspiracy to the jury as there was no substantial evidence of a conspiracy (Point IX);
5. The evidence is insufficient (Points X-XII).

On May 4, 1959, appellee received appellants' brief, in which appellants assign eleven errors to rulings of the trial court, and five points are argued. The eleven assigned errors may be generally grouped as follows:

1. The search and seizure at 5417½ South Wilton Place, Los Angeles, California, was illegal. (Ap. Brief, p. 23. Errors 1-4, p.)*

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*"Ap. Brief" stands for Appellants' Brief on Appeal.

2. Appellant Cook's confession was inadmissible. (Ap. Brief, p. 26. Error 7.)

3. The trial court should have granted the appellants' motions for judgments of acquittal or for new trials. (Ap. Brief, pp. 24, 27, 28. Errors 5, 8-11.)

Appellants, in their brief, argue the following summarized five points:

1. The search and seizure at 5417½ South Wilton Place, Los Angeles, California, was illegal;

2. The evidence obtained from this search and seizure is not admissible;

3. The government witnesses lied regarding the arrest of appellant Williams as proved by the United States Commissioner's file;

4. The government failed to disclose the identity of the informer;

5. The evidence was insufficient to sustain the convictions.

IV.
STATEMENT OF FACTS.

In the latter part of January, 1958, or the early part of February, 1958, a confidential informant, Jesse Thomas, advised the narcotics officers that Ruth Williams was selling narcotics out of 5417½ South Wilton Place, Los Angeles, California, and was a source of heroin for Eddie Jewel Bryant. [R. Tr. pp. 238, 286, 289-290.]

On February 10, 1958, Justin B. Burley, a Deputy Sheriff of the Los Angeles County Sheriff's Office assigned to the narcotics detail, met Jesse Thomas, an informant or "special employee" and made arrangements to

meet defendant Eddie Jewel Bryant. [R. Tr. pp. 95-98.] After Jessee Thomas had apparently purchased $50 worth of heroin from Bryant with Official Advance Funds of the Federal Government, Justin Burley was introduced to Bryant as a brother of Jesse Thomas. [R. Tr. pp. 95-99.] The Deputy Sheriff was not present when the informer received the "stuff," but the informer passed the "stuff" over to the Deputy in the presence of defendant Bryant. [R. Tr. pp. 99-100.] There is no substantive count in the indictment relating to this transfer.

On February 13, 1958, Deputy Sheriff Burley picked up the informant, Jesse Thomas, and met other deputies and federal agents at a drive-in. [R. Tr. pp. 102, 179.] At approximately 11:00 that morning Jesse Thomas and Deputy Burley made a telephone call to defendant Bryant, and immediately thereafter met defendant Bryant at a street corner. [R. Tr. pp. 103, 109, 179.] The deputy and the informer entered Bryant's vehicle; wherein, the deputy negotiated with Bryant for the purchase of one-half ounce of heroin for $250 which was paid to her then and there but the delivery of heroin was to be arranged by subsequent telephone call. [R. Tr. pp. 103-105.] Deputy Burley received constant coverage from his fellow officers from the time he met defendant Bryant until he rejoined his covering officers. [R. Tr. pp. 105, 179-181.] At about 12:50 p.m. the same day, Deputy Burley and Jesse Thomas telephoned Bryant and, upon hanging up, immediately proceeded to 4015 Kansas Avenue, Los Angeles, California, the home of defendant Bryant. [R. Tr. pp. 105-106.] The undercover deputy sheriff and the informer entered Bryant's home and were told by Bryant

that she had not been able to contact her connection. [R. Tr. pp. 107-108.] After waiting in Bryant's home for about three hours without being able to "score," the deputy left the residence, conferred with his fellow agents, returned to the residence, got his $250 back from Bryant, and again met with the other agents. [R. Tr. pp. 108-109.] Deputy Burley was covered by his fellow agents during this entire period. [R. Tr. pp. 105-108.]

The events that occurred on the 13th of February, 1958, were not the basis of a substantive count in the indictment. Appellee also stresses that after the 13th of February, 1958, the informant, Jesse Thomas, had absolutely no further connection with the sequence of events culminating in appellants' convictions.

On February 14, 1958, Deputy Burley telephoned defendant Bryant and she told him she was "ready to do business." [R. Tr. pp. 110, 182.] The deputy proceeded to Bryant's residence, entered, and conferred with Bryant regarding the purchase of heroin. [R. Tr. pp. 111, 183.] The deputy gave Bryant $250 of Official Advance Funds, at which time Bryant telephoned "Nita," and said "I have the money and I will be right over." [R. Tr. p. 112.] Bryant then left 4015 Kansas Avenue, Los Angeles, California, but returned in five minutes and advised the deputy that the deal was working. [R. Tr. pp. 113, 183.] By way of parenthetical remark, as it has no direct bearing on this appeal, defendant Juanita Smith resided at 4011 Kansas Avenue, Los Angeles, California—the next door neighbor of defendant Bryant. [R. Tr. p. 390.]

A short time later, while Bryant and the deputy were waiting in Bryant's home, the expected telephoned call

came, and Bryant made arrangements to meet some one near 54th Street and Wilton in Los Angeles, California. [R. Tr. p. 114.] The deputy and Bryant left Bryant's home, entered Bryant's vehicle, and proceeded to the corner of 54th Street and Van Ness in Los Angeles, California, where Bryant told the deputy to wait on the corner. [R. Tr. p. 114.] Deputy Burley observed Bryant's car travel the few blocks to 54th and Wilton and there disappear from his view. [R. Tr. p. 115.]

Covering deputies and agents observed the above detailed sequence of events, including: the deputy telephoning [R. Tr. p. 182], the deputy entering Bryant's home [R. Tr. p. 183], Bryant leaving her home and entering 4011 Kansas Avenue—the house next door to Bryant's [R. Tr. p. 183], and the deputy and Bryant leaving Bryant's home and entering her automobile. [R. Tr. p. 183.] These same covering agents attempted to pursue Bryant's vehicle without being detected, but lost her in traffic around 48th Street [R. Tr. p. 184]; however, they again observed the vehicle about 25 minutes later with Bryant and Deputy Burley in it when it arrived back at Bryant's home, at which time Burley left Bryant and subsequently met with these covering agents. [R. Tr. p. 185].

Deputy Burley waited on the street corner for about 10 or 15 minutes; then Bryant reappeared in her vehicle, picked up Burley, and handed Burley a contraceptive containing approximately one ounce of heroin. [R. Tr. p. 115; Government's Exhibit I.]

The above-related facts happened on February 14, 1958, and relate to counts one and eight of the indictment.

On February 17, 1958, Deputy Burley telephoned Bryant and arranged to purchase an ounce of heroin. [R. Tr. p. 121.] The deputy then drove to Bryant's home, parked his car, and was admitted by Bryant into her home. [R. Tr. p. 121.] There was another person in the home at this time named Jimmy, but he was not a witness at the trial. [R. Tr. p. 122.] The deputy discussed the possibility of bigger buys of narcotics with Bryant who advised the deputy that it could be arranged. [R. Tr. p. 123.] The deputy then handed Bryant $250 of Official Advance Funds, joined "Jimmy" in the other room, and overheard Bryant talk on the telephone and ask for "Juanita." [R. Tr. pp. 123-124.] A little later, Deputy Burley overheard Bryant telephone again and ask for Juanita. [R. Tr. p. 125.] Ten or fifteen minutes later Deputy Burley saw Bryant answer the front door and talk to what sounded like a woman whom Bryant subsequently identified as being "Juanita." [R. Tr. p. 126.] Although Deputy Burley could not and did not see the caller, the covering agents outside the house saw this caller and identified her as Juanita Smith. [R. Tr. pp. 187-191.] Forty-five minutes after Juanita Smith left and Bryant told Deputy Burley that the deal was working, a little girl rang the doorbell but Bryant would not open the door. [R. Tr. pp. 126-127.] Then, eight minutes later Juanita Smith rang the doorbell, Bryant met her at the door, and Juanita left. [R. Tr. pp. 126-127.] Bryant immediately returned to the deputy and handed him a contraceptive which contained 303 grains of heroin. [R. Tr. pp. 127-128.]

Deputy Sheriff Farrington, on this same date, was one of the covering officers. [R. Tr. p. 186.] He observed

Deputy Burley make a telephone call, and shortly thereafter enter Bryant's residence at 4015 Kansas Avenue, Los Angeles, California. [R. Tr. p. 187.] He then "staked out" in such a position that he was able to see the entire front of Bryant's house and part of one side. [R. Tr. pp. 187-195.] After some wait, he observed Juanita Smith and appellant Ruth Williams drive up in a 1957 green Chevrolet belonging to Fred Cook [R. Tr. p. 530], and park between 4011 and 4009 Kansas Avenue. Williams entered 4011 Kansas Avenue, Smith went to the door of 4015 Kansas Avenue; and then both Williams and Smith returned to the vehicle and drove off. [R. Tr. pp. 187-191.] Deputy Sheriff Landry and Federal agent Richards followed Smith and Williams to 5417½ South Wilton Place, Los Angeles, California, waited a short time, and then returned to 4015 Kansas Avenue. [R. Tr. pp. 530-531.] About 35 minutes later, Farrington saw Juanita Smith drive up to 4015 Kansas Avenue, Los Angeles, California, in a 1957 Ford which belonged to appellant Ruth Williams alias Johnson. [R. Tr. p. 533.] Smith went into Bryant's home for a few minutes, came out, and drove away in Cook's car. [R. Tr. pp. 191-192.] Deputy Sheriff Gillette was with Deputy Farrington and testified to the same events. [R. Tr. pp. 487-489.] Deputy Sheriff Landry was also "staked out" but in a different location; he testified to the same events. [R. Tr. pp. 527-534.]

As soon as Bryant handed Deputy Burley the contraceptive containing heroin, Burley left Bryant's home, met with his covering officers, and all present initialed the contraceptive. [R. Tr. pp. 127-128, 193.]

The above related facts happened on February 17, 1958, and pertain to counts two, three and eight of the indictment.

On February 20, 1958, Deputy Burley met defendant Bryant "by accident," that is, without any prearrangement, in the Los Angeles Municipal Court. [R. Tr. p. 130.] At that time, Bryant—referring back to their conversation on February 17, 1958—informed Burley that her (Bryant's) connection agreed to sell three ounces of heroin for $700 or four ounces for $750, and Burley said he would see her soon. [R. Tr. pp. 131-132.]

On February 21, 1958, there was a repeat performance of the transaction on February 14, 1958. On February 21, 1958, Burley telephoned Bryant; Burley went to Bryant's home at 4015 Kansas Avenue, Los Angeles, California, entered this residence and talked to Bryant; Burley and Bryant left Bryant's home, entered Bryant's vehicle, and drove to 54th and Van Ness in Los Angeles, California, where Burley left the vehicle and waited on that corner. [R. Tr. pp. 132-134.] About 15 minutes later, Bryant returned to the corner, picked up Burley, and handed him a contraceptive containing 390 grains of heroin. [R. Tr. pp. 134-135.]

On this date Deputy Sheriff Farrington was one of the covering officers. He observed: Burley make a telephone call, Burley enter Bryant's home, Burley and Bryant leave Bryant's home and drive off in Bryant's vehicle. [R. Tr. p. 196.] He further observed: Burley get out of Bryant's car on the corner of 54th and Van Ness, Bryant drive to 5417½ South Wilton Place, Los Angeles, California, the home of appellant Ruth Williams. [R. Tr.

pp. 196-197.] Deputy Farrington then saw Bryant enter 5417½ South Wilton Place, Los Angeles, California. [R. Tr. p. 199.] Shortly thereafter Deputy Farrington saw Bryant leave the alley alongside 5417½ South Wilton Place, drive away in her vehicle, pick up Burley on the street corner, and return to her home. [R. Tr. pp. 199-200.] Farrington then met with Burley and the other officers and initialed the evidence. [R. Tr. p. 200.]

Deputy Sheriff Gillette was with Deputy Farrington on February 21, 1958, and he observed the same events. [R. Tr. pp. 489-493.]

The above related facts pertain to counts four and eight of the indictment.

On February 24, 1958, the sequence of events and the time of their occurrence is very important. This was to be the day of the "big buy."

In the morning of February 24, 1958, the agents prepared $750 of Official Advance Funds by recording the serial number of each bill and by dusting each bill with a fluorescent powder which is invisible to the naked eye but fluoresces in color under an ultraviolet or "black" light. [R. Tr. pp. 136, 222, 230-233, 540, 563-565.] Federal Narcotics Agent Malcolm Richards appeared before United States Commissioner Theodore Hocke and obtained a search warrant for 5417½ South Wilton Place. [Tr. p. 10.] The stage was thus set.

At about noon on February 24, 1958, Deputy Burley telephoned Bryant and advised her he was ready "to do the big thing." [R. Tr. p. 137.] Burley drove to Bryant's home, entered therein at about 1:00 o'clock and agreed to purchase 3 ounces of heroin from Bryant for

$750 which he gave her. [R. Tr. p. 138.] A short time later Bryant answered the doorbell spoke briefly to a man Burley could not see from where he was, returned to Burley in the bedroom and advised him that there was a slip-up in that her connection misunderstood the order and sent over 3 half pieces (half ounces) rather than 3 whole pieces (ounces), but he would be back shortly with the other 3 halves. [R. Tr. pp. 138-139.] About 20 minutes later Bryant again answered the front door, talked briefly to a man, returned to Burley in the bedroom, and handed him 3 more contraceptives containing heroin. [R. Tr. p. 139.] After Burley had received 6 contraceptives containing heroin from Bryant he left Bryant's home and conferred with Agents Richards and Gilkey. [R. Tr. p. 141.] Burley then met Sheriff's Deputies Farrington and Smith (a female deputy) and Federal Narcotics Agents Abe and Roumo and returned to Bryant's home. [R. Tr. p. 142.] Bryant was arrested in her home by these officers and $150 (one fifty and ten ten dollar bills) of the original $750 given to Bryant by Burley was recovered from Bryant's purse. [R. Tr. pp. 219-230.] This ended the roles of Bryant and Burley.

We must now flash back to the observed activities of the appellants on this day. All eight of the covering officers assembled in the area of the phone booth when Deputy Burley telephoned Bryant at about noon. The following officers were present: Deputy Sheriffs Burley, Farrington, Landry, Gillette and Smith; Federal Narcotics Agents Richards, Gilkey, Abe and Ruomo. [Rep. Tr. pp. 136, 137, 201, 493, 539.]

Four of these covering officers: Farrington, Smith, Abe, and Ruomo took up positions at Bryant's home at

4015 Kansas Avenue, Los Angeles, California. [R. Tr. p. 201.] The other four officers proceeded to positions at the home of appellant Williams, 5417½ South Wilton Place, Los Angeles, California. [R. Tr. pp. 493, 539.] Agent Richards moved between these two groups as a sort of coordinator. [R. Tr. p. 291.] We shall move from group to group in order to see the events unfold chronologically.

At about 12:40 P.M. Deputies Gillette and Landry "staked out" in a yard across the alley from the home of Appellant Williams. [R. Tr. pp. 493-498, 540, 541.]

Around 1:00 P.M. these two officers saw appellant Williams come out of her home on the second floor, walk down the stairway, disappear from their vision around the corner of her yard (towards where the trash cans are kept in which some 4 ounces of heroin were subsequently found), reappear some few minutes later, walk up the stairs, and apparently re-enter her home. [R. Tr. pp. 498, 542.] A few minutes later, around 1:10 P.M., appellant Fred Cook, Jr., walked down the same stairs carrying some clothing. [R. Tr. pp. 498, 543.]

We now switch to Bryant's home where Deputy Farrington observed that about 1:20 P.M. appellant Cook drove up in his car, parked, walked to and entered Bryant's home carrying some clothing, remained inside for several minutes, left Bryant's home carrying the same clothing, entered his car and drove off. [R. Tr. pp. 201, 202.]

Deputies Gillette and Landry, back at appellant Williams' home, at about 1:40 P.M., saw appellant Cook walk up the stairs to appellant Williams' home carrying the same clothing he had left with. [R. Tr. pp. 498, 543.] Some five or ten minutes later appellant Cook was again ob-

served walking down the same stairway carrying the same clothing. [R. Tr. pp. 598, 599, 544.]

Again switching to Bryant's residence, at 1:50 P.M. Deputy Farrington observed appellant Cook drive up to Bryant's home, park, enter Bryant's home carrying the same clothing, come out of Bryant's home a few minutes later carrying the same clothing, enter his car and drive off. [R. Tr. pp. 202, 203.]

At about 2:00 P.M. the officers around appellant Williams' house observed appellant Cook walk up the stairs carrying the same clothing he had left with on both occasions. [R. Tr. pp. 499, 544.]

At about this time, 2:00 P.M., Deputy Burley left Bryant's home and conferred with the officers who had been covering Bryant's home as well as two agents who had been at appellant Williams' home for part of the time, and showed them the evidence as he advised them of the events as he saw them from inside the house. [R. Tr. pp. 141, 204.] Deputy Burley, accompanied by Deputies Farrington and Smith, and Federal Agents Abe and Ruomo, then returned to Bryant's home and arrested her. [R. Tr. pp. 142, 205-218.] After Deputy Farrington assisted in the search of Bryant's home and the recovery of some of the marked money, he joined the other agents and deputies in the area of appellant Williams' home. [R. Tr. p. 230.] It was now about 3:00 P.M., and the agents were ready for the final scene.

Federal Agents Richards and Gilkey and Deputy Sheriffs Landry, Farrington, and Gillette approached 5417½ South Wilton Place, and all but Agent Gilkey walked up the stairs to the door of this residence. [R. Tr. pp. 230, 234, 238, 271, 275, 277, 303, 346, 349.] Deputy Gillette

knocked on the door several times; there was no answer; he tried the door which opened; they walked in. [R. Tr. pp. 238, 271, 282, 283, 303, 347, 349, 413.] Once in the house, the officers immediately saw appellant Williams standing in the doorway of the bedroom. [R. Tr. pp. 277, 347, 349.] Deputy Gillette showed appellant Williams his badge and told her she was under arrest for violation of federal narcotics laws and anything she may say may be used against her. [R. Tr. pp. 99, 234, 271-272, 278, 280, 293-294, 302, 304, 325-326, 332, 349, 415.] The officers also arrested appellant Cook on the same premises. [R. Tr. pp. 385, 545.]

Appellant Williams' purse was searched and $15 of the marked and recorded $750 was found therein. [R. Tr. pp. 500, 567.] The officers brought in the ultraviolet light and the following items fluoresced: the coffee table, the telephone, the clasp on appellant Williams' purse, $15 in the purse, appellant Williams' fingertips, and appellant Cook's fingertips and inside coat pocket. [R. Tr. pp. 375, 386, 500.] At the rear and to the side of the premises in a trash can labeled "5417½" the searchers, in the presence of appellant Williams, found two cans, each of which was sealed with scotch tape, and each contained several small manila envelopes with the tops stapled closed, which, in turn, contained a total of almost 4 ounces of heroin. [R. Tr. pp. 379-381, 421, 429-434, 460, 502-504.] The officers also found in the house: scotch tape [R. Tr. pp. 379, 422], a stapling machine [R. Tr. pp. 379, 422], several containers of milk sugar [R. Tr. pp. 502, 504, 422], an empty box which formally contained contraceptives [R. Tr. pp. 422, 545], six contraceptive wrappers [R. Tr. pp. 422, 545-546], and a box containing empty gelatin capsules. [R. Tr. p. 379.]

Shortly after appellant Cook was arrested he was asked if her knew where any narcotics were, and he stated that he believed there were narcotics out by the trash can because every time somebody came over to pick up narcotics Mrs. Williams (appellant) would go out there and rummage around in the cans. [R. Tr. pp. 483, 547.]

The search of the premises took between two and two-and-one-half hours to complete; thus, since the officers entered at approximately 3:00 P.M., they finished their search around 5:15 P.M. [R. Tr. pp. 416, 422.] Both appellants were kept at the premises during the entire search. [R. Tr. p. 416.] A woman deputy sheriff was also brought in, as one of the arrested persons was a female. [R. Tr. p. 432.] When the search was over, the officers and the appellants entered vehicles and drove to the Federal Building, 312 South Spring Street, Los Angeles, California, where they arrived at about 6:00 P.M. [R. Tr. pp. 648-649, 652.] The available United States Commissioner, whose offices are in the Federal Building, had already left for the day. [R. Tr. pp. 653-656, 682.]

On the following morning, February 25, 1958, complaints charging appellants with violations of the federal narcotic laws were sworn to before the United States Commissioner, and the appellants were arraigned before that United States Commissioner who committed them in lieu of their posting bail. [R. Tr. p. 653; Tr. pp. 1-2.] No officer contacted either of the appellants from the time they were booked in the County Jail until they were arraigned before the United States Commissioner. [R. Tr. p. 714.]

V.

ARGUMENT.

Preliminary Statement.

Appellants have seen fit to raise many points on this appeal at different stages and not always the same points at succeeding stages: 13 points specified in their statement of points upon which they intend to rely as filed in this Court; 11 assignments of error in their brief; and 5 points argued in their brief. Appellee found it necessary for the sake of logical refutation to group and classify appellants' various contentions, and shall proceed to refute all of the appellants' contentions under the following general headings:

1. The search and seizure at 5417½ South Wilton Place, Los Angeles, California;
2. Appellant Cook's confession;
3. The conspiracy instructions given to the trial jury;
4. The disclosure of the informer's identity;
5. The lies of the Government's witnesses;
6. The sufficiency of the evidence.

POINT ONE.

The Search and Seizure at Appellant Williams' Home, 5417½ South Wilton Place, Los Angeles, California, Was Legal as Incident to a Lawful Arrest, and the Property so Obtained Was Properly Admitted Into Evidence During the Trial.

A. Appellee's Position.

On February 24, 1958, the officers had probable cause to arrest both appellants on felony charges. The officers lawfully arrested appellants without warrants of arrest, and made a search and seizure incident to said arrests.

The property obtained as a result of this search and seizure was properly admitted into evidence. This of course is the position appellee took in the trial court, and constitutes the holding of the trial court.

B. Appellants' Claims.

At different times and in different proceedings appellants have claimed all of the following:

1. A search without a search warrant is invalid;
2. A search under a void search warrant is no good;
3. A search without a search warrant or a warrant of arrest is void.
4. The arrest of appellants was invalid.

C. Discussion of Probable Cause.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> U. S. Const., Fourth Amend.

Title 21, U. S. C., Section 174, makes it a felony for anyone to unlawfully sell, receive, conceal or transport heroin.

Title 26, U. S. C., Section 7606 authorized agents of the Federal Bureau of Narcotics to:

> "(2) make arrests without warrant for violation of any law of the United States relating to narcotic

drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The term "probable cause" as used in the Fourth Amendment and the term "reasonable grounds" as used in 26 U. S. C., Section 7607, have the same meaning.

United States v. Walker, 246 F. 2d 519 (7th Cir., 1957);

C. f., United States v. Bianco, 189 F. 2d 716 (3rd Cir., 1951).

On numerous occasions the Supreme Court has defined "probable cause" as follows:

"In dealing with probable cause, however, as the name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act.

* * * * * * * *

"The substance of all the definitions of probable cause is a reasonable ground for belief of guilt . . . Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

Draper v. United States, 358 U. S. 307 (1959);

Brinegar v. United States, 338 U. S. 160 (1949);

Go-Bart Co. v. United States, 282 U. S. 344 (1931);

Husty v. United States, 282 U. S. 694 (1931);

Dumbra v. United States, 268 U. S. 435 (1925);

Carroll v. United States, 267 U. S. 132 (1925);

Steele v. United States, 267 U. S. 498 (1925);

Stacey v. Emery, 97 U. S. 642 (1878).

The first factual issue we must determine is whether or not the arresting agents had "probable cause" and/or "reasonable grounds" to arrest appellants. At the hearing on appellants' Motions to Suppress Evidence before Judge Mathes, Deputy Sheriff Gillette, one of the arresting officers, testified that in addition to all the other known facts, the officers: "had information . . . from a reliable confidential informant who stated she (appellant Williams) was selling narcotics from that location (5417½ South Wilton Place, Los Angeles, California), and that she (Williams) was a source of supply for Jewel Bryant." [R. Tr. pp. 286, 289-290.] The entire transcript of this hearing was made a part of the trial record at appellants' request. [R. Tr. pp. 245-246.] However, even at the trial Deputy Gillette testified: "I had information from a confidential informant, from Jesse Thomas, to the effect that Ruth Williams who lived at 5417½ Wilton Place, was engaged in the illegal sale of narcotics." [R. Tr. p. 238.]

As we saw above in the Statement of Facts: by the morning of February 24, 1958, the day of the arrests, the same agents had already received delivery of heroin from Bryant on the three separate indicated occasions, February

14, 17 and 21, 1958, and at the time of the first buy, Bryant apparently obtained her heroin from someone or some place in the vicinity of 54th and Wilton in Los Angeles, California; at the time of the second buy, appellant Williams was with Juanita Smith in appellant Cook's car at Bryant's residence while Burley and Bryant were negotiating a purchase of heroin, and shortly thereafter appellant Williams and Juanita Smith went to Williams' home, and then Juanita Smith, now driving Williams' car, returned to Bryant's home and apparently delivered heroin to Bryant; at the time of the third buy, Bryant took the Government's money, let Burley out of her car at a street corner, went directly to appellant Williams' residence, entered said residence, came out a few minutes later, joined Burley, and delivered the heroin to Burley.

The agents obtained warrants of arrests for Eddie Jewel Bryant and Juanita Smith on February 21, 1958. Whether or not the agents had "probable cause" or not to arrest appellant *before* any of the transactions of February 24, 1958, is not an issue herein, but if it were, it appears to appellee to be a real borderline situation. However, it is clear that the agents had probable cause to believe that heroin was being concealed at 5417½ South Wilton Place, Los Angeles, California—appellant Williams' residence. The agents went before United States Commissioner Hocke on February 24, 1958, and swore out affidavits stating, in essence, that on February 21, 1958, Deputy Burley arranged to buy an ounce of heroin from Bryant, and Bryant took Burley's money, proceeded directly to 5417½ South Wilton Place, and returned immediately therefrom with the heroin. [Tr. pp. 9-10; Ap. Brief, Append. pp. 2-3.] Based on these affidavits, the

Commissioner issued a search warrant. Obviously, the Commission was satisfied that the agents had probable cause to believe heroin was being concealed at the above-named location. This search warrant was subsequently ruled to be void on its face because it was properly filled out, but the grounds for obtaining this warrant were never challenged and never ruled upon.

After obtaining the search warrant, the officers made the final arrangements for the "big buy" on February 24, 1958, "dusting" and recording the serial numbers of the money, and placing themselves in positions of observation and cover. Deputy Burley then arranged to buy three ounces of heroin from Bryant, which was delivered in two installments. Appellant Williams was observed to leave her home, go to her yard, and return to her home. Appellant Cook was then seen to make two trips from Williams' home to Bryant's home and back again. Bryant was then arrested and part of the marked money recovered. The agents then assembled, exchanged, and correlated their information, and were ready to proceed. We might note here that agents who were about to arrest appellants were the same agents who had been on the entire case from its inception.

One further fact the agents possessed: they had checked the telephone and the utilities for 5417½ South Wilton Place, Los Angeles, California, and found them listed in the name of Ruth Williams.

Now we can answer the proposed question: Did the agents have probable cause to arrest appellants? It is very clear that an affirmative answer is the only possible answer.

Many decisions teach us that questions of probable cause can only be resolved upon the facts and circumstances present in each case, but sometimes analogies and comparisons are helpful.

On May 11, 1959, this Court of Appeal handed down its decision in *Rodgers v. United States,* No. 16,020, where in the Court, after a thorough analysis of the law and facts, found the agents had probable cause for the arrest of the defendant under 26 U. S. C., Section 7607(2), based on an unknown informant's statements that were buttressed by the agents' subsequent observations prior to arrest.

See, also:

Bell v. United States, 254 F. 2d 82 (D. C. Cir., 1958).

In the recently decided case of *Draper v. United States, supra,* the Supreme Court held that an experienced federal narcotics agent was justified in arresting and searching the defendant, when all the agents had was a tip from a reliable informant that the defendant was peddling narcotics. That Court, at page 310, stated:

> "The crucial question for us then is whether knowledge of the related facts and circumstances gave . . . (the federal agent) 'probable cause' within the Fourth Amendment and 'reasonable grounds' within the meaning of . . . (26 U. S. C. 7607), to believe that petitioner had committed or was committing a violation of the narcotic laws. If it did, then the arrest, though without a warrant, was lawful and the subsequent search of petitioner's person and the seizure of the found heroin were validly made incident to a law-

ful arrest, and therefore the motion to suppress was properly overruled and the heroin was competently received in evidence at the trial. *Weeks v. U. S.* 232 U.S. 383, 392; *Carroll v. U. S.,* 267 U.S. 132, 158; *Agrello v. U. S.,* 269 U.S. 20, 30; *Giordenello, U. S.,* 357 U.S. 480, 483."

The Court then decided that there was probable cause to arrest, and sustained: the arrest, the search, the seizure, and the admissibility into evidence of the property so seized. If the facts in the *Draper* case support a finding of probable cause, and they do, then it is inconceivable that the facts in the instant case could give rise to any other conclusion.

We conclude that prior to arresting appellants on February 24, 1958, the arresting officers had:

1. Authority to arrest without a warrant of arrest;
2. Probable cause to believe appellants *had* committed the felonies of selling, receiving, concealing, and transporting heroin;
3. Probable cause to believe appellants *were* then committing the felonies of receiving and concealing heroin.

D. Discussion of the Arrest.

We saw in the Statement of Facts above that at about three o'clock on the afternoon of February 24, 1958, the officers climbed the stairs to appellant Williams' home, knocked several times on the door, heard no response, tried the door, found it was unlocked, opened the door, stepped into the house, placed appellant Williams under arrest, and then placed appellant Cook under arrest. Appellants, in their brief, page 18, state that this is the testimony of the

officers, and at page 35 state that there is no dispute over the Government's version of these facts; however, appellants have added the screen door in the latter recitation of facts, but it is of no consquence. There appears to be some disagreement as to just when appellants were arrested. In appellants' brief we read:

> "The officers just opened the door and walked in without saying a word. (Citation.) The officers made a thorough search of the upstairs living quarters, the downstairs rumpus room, the washroom and the yard. (Citation.) After the search was over, appellants Williams and Cook were taken to the federal narcotics office in the Federal Building and were held there for about 3 hours. They were then booked in the Los Angeles County Jail on suspicion of a federal narcotics violation. (Citation.)
>
> "Appellants Williams and Cook were arrested some time in the late afternoon of the next day, February 25, 1958." (P. 9.)
>
> "The officers knocked on the screen door but received no response. They then tried the door, found it unlocked and entered the house. They presented the search warrant which Federal Narcotics Officer Richards had to Williams, who they found standing in one of the two bedrooms. Apparently, she had just gotten out of bed in response to the knocking, but the officers entered so quickly after a knock or so that she was unable to inquire as to who was coming in. After showing appellant Williams the search warrant, the officers used up about two hours . . ." (Pp. 35-36.)
>
> "That the entry into Ruth Williams' house and the so-called arrest and search of her premises . . ." (P. 38.)

"The appellants were not arrested until some 18 hours after the search had been completed. . . ." (P. 54.)

In each of these passages appellants overlook the arrest or belittle it, necessitating, we think, a look at the record.

Deputy Sheriff Farrington, one of the officers in the arresting party, testified at the motion to suppress:

"After proceeding up the stairway to that residence, Deputy Gillette, Sgt. Landry, Agent Richards and myself—Deputy Gillette was the first officer facing the doorway. He knocked on the doorway several times. There was no answer. He opened the door and proceeded into which is the kitchen of the apartment. Deputy Gillette, Sgt. Landry and myself turned to our right and walked into the living room at which time we looked ahead of us and saw Mrs. Williams standing in the hallway, which is adjacent to the livingroom, bathroom, and two bedrooms. And at that time Deputy Gillette approached Mrs. Williams and placed her under arrest." [R. Tr. p. 349.]

There was no cross-examination of this witness by appellants at this time. At the trial of this case Deputy Farrington, on direct examination, testified:

"Q. Will you tell us what you did when you entered that residence? A. Deputy Gillette placed Mrs. Williams under arrest . . ." [R. Tr. p. 234.]

On cross-examination of this witness, after establishing that the witness was thoroughly familiar with the inside of appellant Williams' home and was able to pinpoint the

exact position of the parties at the time of arrest, the following dialogue ensued:

> "Q. And, Officer Gillette walked up to her and said, 'I am arresting you for violation of the Federal narcotics laws'? A. Sgt. Gillette placed her under arrest. I did not hear his statement." [R. Tr. p. 415.]
>
> * * * * * * * *
>
> "Q. Now, when you—when Mrs. Williams was told that she was put under arrest where was Mr. Richards at that time? A. As we entered Mr. Richards stepped to his left . . ." [R. Tr. p. 417.]

On the motion to suppress Deputy Gillette testified on direct examination:

> "We knocked several times on the door, and there was no response. I then tried the door knob and it was open and I walked in. I walked past the kitchen into the livingroom and entered a hallway, where I observed the defendant Williams standing in the doorway to a bedroom. I then placed the defendant Williams under arrest and advised her of her constitutional rights.
>
> Q. (By the Court): What did you say to her? A. I said, 'Ruth, you are under arrest for violation of the Federal narcotics laws.'
>
> Q. (By the Court): What did you say to her. A. I told her she didn't have to make any statements if she didn't wish to, and that she should contact her lawyer and receive counsel as soon as possible." [R. Tr. pp. 271-272.]
>
> * * * * * * * *
>
> "Q. Was she placed under arrest before you started to search? A. Yes, sir." [R. Tr. p. 273.]

Then on cross-examination the witness testified:

"Q. You arrested her the minute you walked in, is that correct? A. That is correct." [R. Tr. p. 282.]

"Q. And then you got that information and then you walked in and arrested her and searched the place after you arrested her, is that correct? A. That is correct." [R. Tr. pp. 293-294.]

At the trial on cross-examination this witness again testified:

"Q. Well, what did you say to Ruth Williams when you walked in? A. I had my badge in my hand and I told her, 'Ruth, you are under arrest for violation of the Federal narcotics laws.'" [R. Tr. p. 517.]

Deputy Landry testified on direct examination on the motion to suppress as follows:

". . . Deputy Gillette knocked on the door several times. There was no answer. He then tried the door, and entered. I was immediately following behind him with, I believe, Farrington behind me. We entered through the door and into the livingroom, I believe, and toward a hall, at which time I observed Mrs. Williams standing in the hall doorway between what appeared to be a bedroom and a doorway. Gillette, my partner, walked up to her. I walked with him. And he stated, 'Ruth you are under arrest.'

Q. After placing her under arrest did you aid the officers in making a search of the premises? A. Yes, sir, I did." [R. Tr. p. 99.]

There was no cross-examination of this witness at this hearing.

This was essentially the evidence from the Government's point of view, but how about from appellants' point of view? Appellant Williams did not testify at the trial, but did testify at the hearing on the motion to suppress, where, on direct examination, she said:

> "Q. Did you hear anyone knock? A. No.
>
> * * * * * * * *
>
> Q. Do you recall Sgt. Gillette who testified here this morning saying anything to you at all? A. I never seen him." [R. Tr. pp. 325-326.]

(To the same effect see appellant Williams' affidavits in support of her motions to suppress evidence. [Tr. pp. 23, 44.])

On cross-examination appellant Williams testified:

> "Q. When were you placed under arrest, Mrs. Williams? A. The 24th of February.
>
> Q. Who put you under arrest? A. Well, Malcolm Richards.
>
> Q. Where were you when he put you under arrest? A. In my home.
>
> Q. Whereabouts in your home? A. In my bedroom.
>
> Q. Did he put you under arrest when he first came in your bedroom? A. Yes.
>
> Q. This is prior to searching, he put you under arrest? A. No. He arrested me—yes. When he came in the room and showed me this thing he had in his hand.
>
> Q. Then he put you under arrest? A. Yes.
>
> Q. After that he searched the premises. A. Yes." [R. Tr. p. 332.]

From the foregoing excerpts, it is clear that the very first thing the officers did when they entered appellant Williams' home is to place her under arrest. After that she was served with a copy of the search warrant which was, in law, void.

We have thus established the time, place, and conditions of the arrest; and from these factors we must decide whether this is a legal arrest.

In order to determine the legality of this arrest it must first be determined whether federal law or state law is the yardstick. Appellants contend that the Federal Constitution and the Federal Rules of Criminal Procedure are the yardsticks and cite *Giordenello v. United States,* 357 U. S. 480 (1958), as authority. (Ap. Brief, p. 48.) Appellee answers that *Giordenello* is not authority for that proposition, and that the Supreme Court has many times held that the governing law of an arrest without a warrant is the law of the state in which the arrest is made.

In *Giordenello* the Court held that the complaint which gave rise to the Commissioner's warrant of arrest was defective because on its face it did not set forth possible cause; thus, the warrant of arrest was invalid, the ensuing arrest was invalid, and, finally the search and seizure incident to that arrest was illegal and the property seized inadmissible into evidence. The Government contended that even if the warranty of arrest was invalid, the arrest was justified apart from the warrant. On pages 487, 488, the Court said:

> "In this Court, however, its principal contention has been that the arrest was justified apart from the

warrant. The argument is that Texas law permits arrest without a warrant upon probable cause that the person arrested has committed a felony; that in the absence of a controlling federal statute, as in the case here, federal officers turn to the law of the State where an arrest is made as the source of their authority to arrest without a warrant, *cf. United States v. Di Re,* 332 U. S. 581, 589 (1948); *Johnson v. United States, supra* at 15; and . . . .

"We do not think that these belated contentions are open to the Government in this Count and accordingly we have no occasion to consider their soundness.

* * * * * * * *

"This is not to say, however that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant."

Although the majority did not consider and pass on the Government's claim, the minority did, and said at page 492:

"But assuming that the claim is belated, it states the law and our duty is to apply it."

In *United States v. Di Re,* 332 U. S. 581, 589 (1948), the Court said:

"We believe, however, that in the absence of an applicable federal statute the law of the state where an arrest without a warrant takes place determines its validity."

See also:

Johnson v. United States, 333 U. S. 10, 14 (1948).

In the more recent case, *Miller v. United States,* 357 U. S. 301 (1958), the Court at page 305 stated:

> "This Court has said, in the similar circumstance of an arrest for violation of federal law by state peace officers, that the lawfulness of the arrest without warrant is to be determined by reference to state law. (Citation.) By like reasoning the validity of the arrest of petitioner is to be determined by reference to the law of the District of Columbia."

These three cases clearly hold that in the absence of "an applicable federal statute" the law of California should determine the legality of the arrests in the instant case. Is 26 U. S. C. 7607(2) "an applicable federal statute"? Obviously, this statute gives authority to arrest; but it says nothing about the means or methods of making such arrests. If this statute is "an applicable federal statute," and it appears to be, we would conclude that it then is the governing law as to whether the instant arrests were valid; and, if such be true, the only limitation of an arrest by an authorized agent would be its "reasonableness" under the Fourth Amendment to the Constitution of the United States. Appellee contends that in the instant case the agents acted as reasonable and prudent men would in the same or similar circumstances, and thus the arrest is valid.

The legislative history of 26 U. S. C. 7607(2), in addition to being educational and lengthy (46 pages), reveals the purpose of this amendment. The Subcommittee on Narcotics reported:

> "Your subcommittee's inquiry into the enforcement program revealed serious obstacles which have been placed in the path of enforcement officers as the

result of recent court decisions. These decisions have tended, under certain circumstances, to furnish the criminal with a cloak of immunity to the detriment of society as a whole. They have forced changes in recognized investigative procedures which had been sanctioned by the courts for many years. The narcotic traffickers, who are in most cases well-organized professional racketeers, take full advantage of any limitations placed on enforcement officers.

"In some instances enforcement officers have been restricted in their right to arrest without a warrant, and to search and seize contraband before and after a valid arrest. The use of evidence of admissions and confessions following an arrest has been curtailed. Narcotic enforcement officers are restrained from intercepting telephone conversations, even though the telephone is a major instrument of communication between the top narcotic traffickers, and could often provide the necessary evidence to convict these violators. The enforcement officers are required to secure an arrest warrant or a search warrant from a magistrate even though circumstances indicate the impracticability of such a procedure. Narcotic drugs are small in volume and high in price. A fortune in drugs can be concealed under clothing and can be destroyed or moved to a place of safety on a moment's notice. The delay involved in obtaining a warrant from a magistrate permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. These and other restrictions on enforcement officers leave the public unprotected and give narcotic violators, especially the more reprehensible larger racketeers and wholesalers, an advantage over law-enforcement officers in efforts to combat the illicit narcotic traffic. The subcommittee urges that corrective measures in

these areas be taken immediately to permit enforcement officers to operate more effectively.

"The stringency with which some courts apply rules relating to the admission of evidence bearing on narcotic law violations and the difficulty of obtaining warrants under certain circumstances have rendered the problems confronting enforcement officers that much more difficult to meet." (1956 U. S. Code Cong and Adm. News, p. 3302.)

At the present time there are very few circuit court decisions interpreting the scope and application of 26 U. S. C. 7607(2); however, there is one that is directly in point. In *United States v. Volkell,* 251 F. 2d 333 (2nd Cir., 1958), *cert. den.* 356 U. S. 962 (1958), federal narcotics agents with probable cause to arrest the defendants descended via a fire escape from the roof to the floor of the defendants' apartment, climbed into the apartment through an open window, arrested the defendants, and searched the premises. The Appellate Court held that the arrest was legal, the search and seizure was valid as incidental to a lawful arrest, and the property so seized was admissible into evidence. This holding was based solely upon the application of 26 U. S. C. 7607(2) to all of the facts of the case. The Court said:

"The scope of the word 'reasonable' must be construed in relation to the safeguards granted in the Fourth Amendment to the Constitution 'against unreasonable searches and seizures.' Obviously, what is 'reasonable' must be judged against a background of the facts known to the particular agent at the time of the arrest. . . . The agents had reasonable grounds to believe that appellant and Ambrasini had committed violations of the narcotics laws before their entry

into the apartment. The grounds upon which the agents acted more than satisfied the requirements of section 7607(2). The search thereafter was incidental to lawful arrest." (P. 336.)

It is noteworthy that the Supreme Court denied certiorari and that New York state law prohibits the breaking into a house to arrest without a warrant until the arresting officers announce themselves and their purpose.

Clevenger-Gilbert's N. Y. Crim. Code (1956), Sec. 178.

The only Supreme Court decision applying to 26 U. S. C. 7607(2) is the *Draper* case, *supra,* where the arrest was in a public terminal.

Appellee submits that under the rationale of the *Volkell* case, *supra,* the arrest in the present case must be upheld as lawful.

Other federal agents (F. B. I., Secret Service, U. S. Marshals) have the same statutory authority the federal narcotic agents obtained by 26 U. S. C. 7607(2), but decisions thereunder do not reach the parent issues. See:

18 U. S. C. 3052;

18 U. S. C. 3053;

18 U. S. C. 3056.

It is arguable that since 26 U. S. C. 7607(2) confers only the authority to arrest, the test of whether or not the exercise of that authority renders the arrest invalid is still dependent upon the law of the state in which the arrest is made. Although appellee feels that such an argument should lose, appellee is aware of the fact that this

is uncharted territory; hence, appellee feels bound to present this argument.

We agree with appellants that the participation of the federal officers with the state officers throughout the entire investigation makes the operation a federal one, at least for purposes of the "silver platter doctrine." However, the actual arrests in this case were made by state officers which in and of itself may be sufficient reason for applying the state law.

California Penal Code, Section 844 provides:

> "To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

The leading California case applying Section 844 is *People v. Maddox,* 46 Cal. 2d 301, 294 P. 2d 61 (1956), cert. den. 352 U. S. 85, 89 (1956). This was a narcotics case in which the police did not literally follow Section 844, but the court excused strict compliance stating:

> "It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. [7] Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a

> place where he is entitled to be more quickly than he would, had he complied with section 844. [8] Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose . . . Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance . . . Moreover, since the officer's right to invade defendant's privacy clearly appears, there is no compelling need for strict compliance with the requirements of section 844 to protect basic constitutional guarantees . . . We conclude therefore that when there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section does not justify the exclusion of the evidence he obtains." (P. 306.)

In *People v. Cahill,* 163 Cal. App. 2d 15, 328 P. 2d 995 (1958), also a narcotics case, the court said:

> "It was not necessary for the officers to exercise the authority given to them under section 844, Penal Code, because the officers merely opened an unlocked door and entered the premises without objection." (P. 19.)

In *People v. Ramsey,* 157 Cal. App. 2d 185, 320 P. 2d 531 (1958), an abortion case, the police, without warrants of any kind, once used a pass key to enter a private home, and the second time when the pass key would not

open the door, smashed the door in; and on each occasion arrested the people inside, searched the premises and used the evidence so obtained at the time of trial. The Court upheld all of the arrests and the searches incident thereto, citing *Maddox, supra.*

In *People v. Morris,* 157 Cal. App. 2d 81, 320 P. 2d 67 (1958), a narcotics case, the Court, citing *Maddox, supra,* upheld the arrests when:

> "Without knocking or giving any warning of any kind, the officers broke the lock and entered the room." (P. 82.)

In *People v. Shelton,* 151 Cal. App. 2d 587, 311 P. 2d 859 (1957), a bookmaking case, the police, with a search warrant, rang the bell, waited, then forced their way in with a sledgehammer, and the court, affirming the conviction said:

> "The cases hold that where compliance with this provision (Sec. 844, Penal Code) would probably frustrate the arrest or permit destruction of incriminating evidence compliance is not required." (P. 588.)

For other similar cases, see:

People v. Miller, 162 Cal. App. 2d 96, 328 P. 2d 506 (1958);

People v. Barrett, 156 Cal. App. 2d 803, 320 P. 2d 128 (1958);

People v. Thomas, 156 Cal. App. 2d 117, 318 P. 2d 780 (1957);

People v. Andrews, 153 Cal. App. 2d 333, 314 P. 2d 175 (1957);

People v. Guerrera, 149 Cal. App. 2d 122, 307 P. 2d 940 (1957);

People v. Potter, 144 Cal. App. 2d 350, 300 P. 2d 889 (1956);

People v. King, 140 Cal. App. 2d 1, 294 P. 2d 972 (1956);

People v. Sayles, 140 Cal. App. 2d 657, 295 P. 2d 579 (1956).

It is apparent that under the law of California as applied, the arrest in the instant case would be valid.

It is also apparent that the California law is practically identical with the law the Supreme Court applied in the *Miller* case, *supra.* But note, that the Court therein recognized the existence of justification for noncompliance with such state laws:

> "There are some state decisions holding that justification for noncompliance exists in exigent circumstances, as, for example, when the officers may in good faith believe that they or someone within are in peril of bodily harm, *Read v. Case,* 4 Conn. 166, or that the person to be arrested is fleeing or attempting to destroy evidence. (*People v. Maddox,* 46 Cal. 2d 301, 294 P. 2d 6.)
>
> "But whether the unqualified requirements of the rule admit of an exception justifying noncompliance in exigent circumstances is not a question we are called upon to decide in this case." (P. 309.)

We conclude that:

1. The arrest was made immediately upon the entrance of the officers into the house, and before any search was conducted;

2. The arrest is valid as a reasonable arrest under 26 U. S. C. 7607(2);

3. The arrest is valid under California law.

E. Discussion of the Ensuing Search and Seizure.

Appellee has experienced considerable difficulty in ascertaining exactly what appellants contend in regard to the search and seizure and what they contend is the governing law.

All the federal courts have made it clear that a search and seizure incident to a lawful arrest, even without a warrant of arrest, is valid, and the property so obtained is admissible into evidence.

Draper v. United States, 358 U. S. 307, 310 (1959);

United States v. Rabinowitz, 339 U. S. 56, 66 (1950);

United States v. Di Re, 332 U. S. 581, 589 (1948);

Harris v. United States, 331 U. S. 145 (1947);

United States v. Lefkowitz, 285 U. S. 452 (1932);

Agnello v. United States, 269 U. S. 20 (1925);

Carroll v. United States, 267 U. S. 132, 158 (1925);

Abel v. United States, 258 F. 2d 485 (2nd Cir., 1958), *cert. granted,* 358 U. S. 813 (1958);

Work v. United States, 243 F. 2d 660, 662 (D. C. Cir., 1957);

Papani v. United States, 84 F. 2d 160, 162 (9th Cir., 1936);

Baumboy v. United States, 24 F. 2d 512, 513 (9th Cir., 1928);

Brown v. United States, 4 F. 2d 246 (9th Cir., 1925).

In the *Di Re* case, *supra,* the court said:

"If he was lawfully arrested, it is not questioned that the ensuing search was admissible." (P. 587.)

In the *Carroll* case, *supra,* the court said:

> "When a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." (P. 158.)

This *Circuit* in the *Papari* case, *supra,* said:

> "The general rule is 'that one's house cannot lawfully be searched without a search warrant; "and the exception thereto is that one's house may be lawfully searched without a search warrant" as an incident to a lawful arrest therein.' " (P. 162.)

Appellants, on page 39, *et seq.,* of their brief, rely heavily on *Johnson v. United States,* 333 U. S. 10 (1948), and state:

> "We see no way to distinguish the *Johnson* case from the case at bar except that our case is a stronger one against the Government than the *Johnson* case."

The *Johnson* case is easily distinguished from the instant case in that in *Johnson* the court held that there was no probable cause for the arrest and the arrest was incidental to the search, and, as appellee has pointed out, in the instant case there is probable cause to arrest and the search was incidental thereto. Also for the current standing of *Johnson,* see below.

Appellants also rely heavily upon *Trupiano v. United States,* 334 U. S. 699 (1948), and *McDonald v. United States,* 335 U. S. 451 (1948), wherein searches were not upheld because there was time to get search warrants.

In 1950, the Supreme Court was again called upon to determine the reasonableness of a search, without a warrant, incident to a lawful arrest, and in *United States v. Rabinowitz,* 339 U. S. 56, 66, the majority said:

> ". . . to the extent that *Trupiano v. United States* requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled."

And Justice Frankfurter in dissent said:

> ". . . in overruling *Trupiano* we overrule the underlying principle of a whole series of recent cases: *United States v. Di Re,* 332 U. S. 581, *Johnson v. United States,* 353 U. S. 10, *McDonald v. United States,* 335 U. S. 451."

Although the arrest in *Rabinowitz* was made upon a warrant of arrest, the principle remains the same even if the arrest was made without a warrant, if it was a legal arrest.

In the recent case of *Abel v. United States, supra,* the Circuit Court pointed out, at page 492:

> "With the single exception of *Trupiano v. United States* (citation) . . . overruled in *United States v. Rabinowitz, supra,* the Supreme Court has consistently held that government agents may, as incident to lawful arrest, conduct a search of the premises where the arrest is made."

Appellants cite *Work v. United States,* 243 F. 2d 660 (D. C. Cir., 1957), as "directly in point." However, in that case the court held at page 662:

> "We should add that the search and seizure were not incident to a valid arrest which could have made

it reasonable without the necessity for a search warrant. In fact there was no arrest at all preceding the search and seizure."

This clearly is not true in the instant case.

Appellants rely on *Jones v. United States,* 357 U. S. 493 (1958), as authority that:

> "Where a search warrant is required for the search of a home, there can be no such thing as entry into the home and search of it without a search warrant whether or not the search is incident to a valid arrest." (Ap. Brief, p. 49.)

That is not the holding of the case. The facts of the case show that there was no arrest inside of the house, and the Court carefully explained why *Rabinowitz* was not applicable. The Court said, at page 499:

> "The case of *United States v. Rabinowitz, supra,* upon which the District Court relied, has no application here. There federal agents, without a search warrant, explored the office of the defendant and thereby obtained evidence used against him at trial. But immediately after entering the office and before their search, the agents executed a warrant they had previously obtained for the defendant's arrest. The Court stressed that the legality of the search was entirely dependent upon an initial valid arrest. (Citation.) The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them. (Citations.) None of these exceptions obtains in this case."

Appellants, on page 29, state that "the arrest of the accused without a warrant is no more defensible than a search under a void search warrant," and cite *Baumboy*

v. United States, 24 F. 2d 512 (9th Cir., 1928), as their authority.

In the *Baumboy* case the search warrant was defective because its supporting affidavits did not state facts sufficient to constitute probable cause, and although the agents arrested defendant without a warrant before searching, they knew no more than was stated in the affidavits for the search warrant. The Court holding that there was no probable cause to sustain the arrest said at page 513:

> ". . . it is urged that the seizure may be justified as an incident of the arrest, but the arrest was, to say the least, no more defensible than the search."

Appellants, on page 30, state:

> "Belief on the part of the arresting officers, however well-founded, that narcotic drugs were concealed in appellant Ruth Williams' dwelling house, furnished no justification for the search of her home without a warrant. Searches of homes without a warrant have universally been held to be unlawful notwithstanding facts unquestionably showing probable cause.

As authority for this appellants cite, *inter alia, Agnello v. United States,* 269 U. S. 20 (1925). The *Agnello* case stated:

> "While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as incident to a lawful arrest therein." (P. 32.)

Appellants' citation is not complete. The decision says:

> "Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal

> or state, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. (Citation.) Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." (P. 33.)

Although appellants state: "Where a home, as Ruth Williams' was, is entered by officers without a warrant for the purpose of making an arrest . . .", on page 30, and then apparently contradict themselves by stating, on page 31: "When it appears, as it did here, that the search of Ruth Williams home and not the arrest was the real object of the officers entering upon the premises . . .", no supporting references to the transcript of record are provided as to what the officers' purpose was when they entered appellant Williams' home.

The arresting officer testified on cross-examination:

> "Q. And you went in to assist him with serving the search warrant, is that it? A. I went in to assist him and to arrest the defendant and then—
>
> Q. No, that isn't what I asked you . . ." [R. Tr. p. 275.]

The federal agent, Richards, testified on cross-examination:

> "Q. And then did you say to him (Officer Gillette) you arrest Mrs. Williams and then I will serve the search warrant afterwards? Did you say that to him? A. No, I didn't say that.

Q. How did it happen that Gillette just walked up and arrested her? A. Well, we were going to arrest her, anyway, for her participation.

Q. Who was going to arrest her, the Federal officers or the State officers? A. We work in conjunction with each other, so—

Q. (By the Court): Who was the first one in the house? A. Officer Gillette was the first one." [R. Tr. pp. 318-319.]

Deputy Farrington, one of the officers in the arresting party, testified:

"Q. (By the Court): Was a search warrant your authority for entering the place? A. No, sir, it was not. I entered 5417½ Wilton Place for the express purpose of arresting the defendant Williams." [R. Tr. p. 239.]

There is no testimony to the contrary. In addition to the above quoted testimony of the officers, we saw, above, that upon entering the premises the first thing the officers did was to place appellant Williams under arrest, and then serve her with a search warrant. It is apparent that the arrest was not a pretext for the search, but rather that the arrest was a motivating object.

Other cases cited by appellants are easily distinguished from the case at bar.

In *Kraemer v. United States,* 353 U. S. 346 (1957), the court held the search was illegal because the agents took everything that was in the cabin searched, and removed the items some 200 miles.

In *Brown v. United States,* 4 F. 2d 246 (9th Cir., 1925), the court held the arrest was based on mere sus-

picion, rather than probable cause. Same holding *Poldo v. United States,* 55 F. 2d 866 (9th Cir., 1932).

In *Williams v. United States,* 237 F. 2d 789 (D. C. Cir., 1956), the court held: "The arrest of appellant was illegal because without a warrant, without probable cause, and without other validating circumstances."

In *Lee v. United States,* 232 F. 2d 354, 355 (D. C. Cir., 1954), the court held: "The testimony shows that the search and seizure preceded the arrest, and the officers intended by the entry and search to secure evidence upon which to predicate the subsequent arrest."

The court, in the instant case, after the hearing on the motion to suppress, signed and filed a written order denying the motion. [Tr. pp. 36-38.] This order was supported by findings of fact, including:

> "5. That the arresting officers on February 24, 1958 had probable cause to believe that defendant Ruth Johnson Williams had committed a felony and that defendant Ruth Johnson Williams was committing a felony, and the arrest without a warrant of arrest was a lawful arrest.
>
> "6. That the defendant Ruth Johnson Williams was placed under arrest . . . prior to any search . . .
>
> "7. That the search . . . was a reasonable and valid and legal search incident to a lawful arrest. . . ." [Tr. p. 37.]

Appellants do not argue that the arresting officers lacked probable cause to arrest appellants, although they do claim the judge erred when he ordered their motion denied.

Appellee admits that the lower court found the search warrant "wholly inadequate and insufficient on its face" [Tr. p. 37]; however, appellee contends that from this fact all that can be concluded is that the search warrant standing alone cannot justify the search. The insufficiency of the search warrant does not carry over, effect or affect the validity of the arrest. In *United States v. Lefkowitz,* 285 U. S. 452 (1932), the court while sustaining a search of a house incident to a lawful arrest therein, pointed out that even if the warrant for arrest is invalid, if the arresting officer had probable cause upon which to arrest then the arrest is valid. (See *Giordenello v. United States, supra.*)

The scope of the search and seizure in the instant case was reasonable in view of all the circumstances; including: appellant Williams arrested at junction of at least 3 rooms, appellant Cook arrested on the lower floor, appellant Williams was seen heading toward the trash cans prior to the delivery of any narcotics on February 24, 1958, and appellant Cook's statement to the officers at the time of his arrest.

See:

Rabinowitz v. United States, 339 U. S. 56 (1950);
Harris v. United States, 331 U. S. 145 (1947);
Hamer v. United States, 259 F. 2d 274 (9th Cir., 1958).

We conclude:

1. The search and seizure was incident to a lawful arrest, and as such valid.

2. The evidence so obtained was admissible.

3. The scope of the search and seizure was reasonable.

F. The Search and Seizure and Appellant Cook.

This point is not discussed by appellants. The first motion to suppress evidence was culminated with a hearing, and a written order was made only on behalf of appellant Williams. [Tr. pp. 19-20, 36-38; R. Tr. pp. 65, 250.] In the second motion to suppress evidence and during the trial appellant Cook was always joined with appellant Williams in the attempts to suppress the evidence obtained as a result of the search of Williams' home. [Tr. pp. 41, 87-89.]

The law is clear that one must have "standing" in order to move to suppress evidence on the claim that it is the fruit of an illegal search and seizure. To obtain this standing the claimant must demonstrate some possessory interest in the premises searched or claim some proprietary interest in the property seized.

United States v. Lefkowitz, 285 U. S. 452 (1932);

Lovette v. United States, 230 F. 2d 263 (5th Cir., 1956);

Fisher v. United States, 227 F. 2d 930 (9th Cir., 1955), motion den., 229 F. 2d 860 (9th Cir., 1956);

Gaskins v. United States, 218 F. 2d 47 (D. C. Cir., 1955);

Shurman v. United States, 219 F. 2d 282 (5th Cir., 1955);

Scoggins v. United States, 202 F. 2d 211 (D. C. Cir., 1953);

Ingran v. United States, 113 F. 2d 966 (9th Cir., 1940);

Kwong How v. United States, 71 F. 2d 71 (9th Cir., 1934).

Appellant Cook nowhere claims either requisite interest, hence he has no standing to object to the admission into evidence of the property seized at appellant Williams' home. Also, Cook is not charged with the "possession" of the heroin found there, and all of the non-narcotic property that was seized there and put into evidence was offered and received in evidence only as to appellant Williams.

G. Admissibility of Non-Narcotic Property Seized.

Appellants contend that the non-narcotic property seized is inadmissible into evidence because, in addition to being illegally seized, it is incompetent, irrelevant and immaterial, and no proper foundation was laid for its admissibility. (Ap. Brief, pp. 50-51.) Appellants state that the Government made a blanket offer of the articles inventoried on the return of the search warrant, and specify Exhibits 7, 7-A, 7-B, 8, 8-A, 8-B, 8-C, 8-D, and 9. Appellants then contend:

> ". . . that the admission of the conglomerate paraphernalia such as cans of milk sugar, corn starch, a half box of .32 caliber bullets, some rolls of scotch tape, some empty milk sugar cans, a stapling machine with a supply of staples, a shiek box with wrappings of six contraceptives, a paper tablet with certain markings, and things of the sort which were included in the exhibits, does, above all else, require a reversal of this case. . . ."

Appellants' lack of specificity is as noticeable as their use of sweeping generalities. It would appear that appellants believe that the "half box of .32 caliber bullets" and a "paper tablet" were received in evidence. Appel-

lants do not connect up the above listed Exhibits with the "conglomerate paraphernalia," but appellee will and does:

Exhibit 7 is seven manila envelopes, each containing heroin, that were stapled shut, and were found in a scotch taped, sealed can in appellant Williams' trash can. [Tr. p. 68; R. Tr. p. 382.]

Exhibits 7-A and 7-B are copies of the list of the serial numbers of the money used on the last buy.

Exhibit 8 is the box which was used to store all the non-narcotic property so as to prove continuity of possession. It was not offered into evidence, and was not received in evidence. [R. Tr. pp. 375-377.]

Exhibit 8-A is the three rolls of scotch tape, and they were offered and received into evidence. It is noted that the cans in which the heroin was found were sealed with scotch tape. [R. Tr. pp. 377, 382-384.]

Exhibit 8-B is the stapling machine and was offered and received into evidence. The envelopes which contained the heroin were stapled shut. [R. Tr. pp. 377, 379, 382-383.]

Exhibit 8-C is the box of empty gelatin capsules commonly used to store narcotics in. It was offered and received into evidence. [R. Tr. pp. 379, 382-383.]

Exhibit 8-D is the can marked "Golden Crumbles" in which the envelopes containing heroin were found. It was offered and received into evidence. [R. Tr. pp. 379-380.]

Exhibit 9 appears to be seven manila envelopes containing heroin. It was offered and received into evidence.

(From the record, Exhibits 7 and 9 are difficult to distinguish.) [R. Tr. pp. 382-384, 503.]

The Government also put into evidence Exhibits 8-E, 8-F, 8-G, 8-H and 8-I which are also non-narcotic properties, but appellants did not object to them and in their brief appellants do not refer to them; so neither will appellee, except to say that none of them are the "half box of .32 caliber bullets" or a "paper tablet," which were not offered or received into evidence at any time. [R. Tr. pp. 503-505.]

It is apparent that we do not even reach the holding of *Kremen v. United States,* 353 U. S. 346 (1957), and if we did, it is not applicable here as the agents seized only what was permissible.

POINT TWO.

The Truthfulness of the Officers' Testimony Regarding the Arrest of the Appellants Without a Warrant Is and Was Unimpeachable.

It appears that appellants blandly contend that they were not arrested by the officers at the time of their entry into appellant Williams' home, and the testimony of the four officers to that effect is a lie that "the officers cooked up" when they learned from appellant Williams' Motion to Suppress Evidence that their search warrant was void. (Ap. Brief, pp. 54-55.)

It is obvious that appellants have no compunctions about calling anyone a liar if it suits their convenience, and that they are dedicated to the slogan "Win at all costs."

Their contention not only has no evidence to support it, but it also blatantly contradicts the evidence. No refer-

ences are made to the transcript to support this claim. In fact, if it were not for the seriousness of this accusation, it could be called a laughable absurdity, because the appellants are in effect admitting perjury. Both appellants testified under oath at some stage of the proceedings, and both of them admitted that they were arrested in appellant Williams' home [R. Tr. pp. 332, 755]; yet, they now call anyone who so states a liar—perhaps they exclude themselves as being above the law.

This contention of appellants should be branded for what it is—a fable, and ignored by this Court.

POINT THREE.

Disclosure of the Informant's Identity.

Appellants contend that when the Government witnesses disclosed the identity of their confidential informant as one "Jesse Thomas" they did not disclose the identity of their confidential informant. (Ap. Brief, p. 56.) When appellants equate "Jesse Thomas" with "John Doe," they are obviously still claiming the officers are liars. There is no basis for this blatant and unwarranted claim. The officers testified at length concerning how long they had known Jesse Thomas and where they met him. [R. Tr. pp. 238, 286, 289-290.]

On April 28, 1958, at the hearing on Appellant Williams' motion to suppress evidence, the identity of the informant was disclosed. [Tr. p. 36; R. Tr. pp. 286, 289-290.] On May 20, 1958, the trial commenced. [Tr. p. 62.]

Appellants state: "The indifference of the officers to the identity of 'Jesse Thomas' who, according to their testimony, was a participant in the offenses charged in the indictment, requires a reversal of the convictions. . . ." (Ap. Brief, p. 56.)

This quotation contains a misstatement of fact. As was indicated above in the Statement of Facts, Jesse Thomas was active in this case on the 10th to the 13th of February, 1958. The earliest date that appears in the Indictment, including the conspiracy count, is February 14, 1958.

The Government was faithful to the holding of *Roviaro v. United States,* 353 U. S. 53 (1957), when it disclosed the identity of its informant.

The court in *Soto v. United States,* 256 F. 2d 733, 734 (7th Cir., 1958) may have had appellants in mind when they said: "Just how any information concerning an informer . . . would aid the defense . . . is unexplained in this record save for some unconnected utterances of . . . counsel . . ."

In *United States v. Gernie,* 252 F. 2d 664 (2nd Cir., 1958), the court pointed out that the Government is not obligated to call as a witness the informant who had worked with the agents or to account for his absence under the circumstances of the case and where the defense had the means of securing information as to his whereabouts. The court, at pages 668-669, said:

> "Furthermore, there was no showing that the government had any more information as to . . .

(the informant's) whereabouts than was available to the defense."

"*Roviaro v. United States* . . . is not in point as the defendant knew who the informant was."

In the narcotics case, *Eberhardt v. United States,* 262 F. 2d 421, 422 (9th Cir., 1958), this court said:

"But the failure of the Government to produce an informer or other person as a witness does not violate the defendant's rights. *Curtis v. Rives,* 75 U. S. App. D. C. 66, 123 F. 2d 936; *Dear Check Quong v. United States,* 82 U. S. App. D. C. 8, 160 F. 2d 251. The Government has no duty to place on the witness stand every person with some knowledge of the circumstances. *Curtis v. Rives,* supra."

See also:

Williamson v. United States, 262 F. 2d 476 (9th Cir., 1959);

Amaya v. United States, 247 F. 2d 947 (9th Cir., 1957);

Sorrentino v. United States, 163 F. 2d 627 (9th Cir., 1947).

It is noteworthy that this particular argument of appellants, like the one before it (Point Two), was not designated as one of their points on appeal in—"Appellants' Statement of the Points upon Which They . . . Intend to Reply on This Appeal," filed in this Court.

POINT FOUR.

The Evidence Is Sufficient to Sustain the Convictions of the Appellants.

Appellants contend that the evidence is insufficient to sustain the conviction, but they do not indicate wherein the alleged deficiency of the evidence lies. They do not cite any necessary element of the offenses that was not proven.

It is a maxim of the law that the evidence must be viewed in the light most favorable to support the judgment.

Glasser v. United States, 315 U. S. 60 (1942);

Robinson v. United States, 262 F. 2d 645 (9th Cir., 1959);

Reynolds v. United States, 238 F. 2d 460 (9th Cir., 1956);

Arena v. United States, 226 F. 2d 227 (9th Cir., 1955), cert. den. 350 U. S. 954 (1956).

Appellee submits that the evidence as indicated above in the Statement of Facts is sufficient to sustain the convictions.

POINT FIVE.

The Confession of Cook Was Properly Admitted Into Evidence.

Appellant Cook's contention appears to be that his confession is not admissible into confession because it was obtained from him during a period when he was illegally detained.

Without rehashing the facts, we saw that appellant Cook was arrested at appellant Williams' home at about

3:00 in the afternoon of February 24, 1958. Both appellants were kept on the premises during the search in accordance with good law enforcement practice as it prohibits to some extent a subsequent accusation such as "They didn't find it at my place, they must have planted it." When the search was concluded, between 5:00 and 5:30 P.M., the appellants were brought to the Federal Building, arriving there at about 6:00 P.M. Both appellants were questioned at the Federal Building by Agent Richards, and both appellants were taken across the street and booked in the County Jail shortly after 8:00 P.M. During this two-hour period appellant Cook confessed. Before he confessed he was again told he did not have to make a statement. He was also given a sandwich and allowed to make a telephone call to his wife. Agent Richards testified that the reason he questioned appellants was to determine the background information for report purposes. (Statement of Facts, *supra.*)

The traditional criterion used by the federal courts in determining the admissibility of an extra-judicial confession was whether or not it was made freely, voluntarily and without compulsion, inducement, or coercion.

> *Wilson v. United States,* 162 U. S. 613 (1896);
>
> *Ziang Sung Wan v. United States,* 266 U. S. 1 (1924).

At the present time the Federal courts, when dealing with confessions, have emphasized not the constitutional fact, but rather whether or not the confession was obtained at a period when the defendant was being illegally detained as far as Rule 5(a) of the Federal Rules of Criminal Procedure is concerned.

Rule 5(a) provides:

> "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

The following four Supreme Court decisions have plotted the recent course of confessions in federal courts:

McNabb v. United States, 318 U. S. 332 (1943);
United States v. Mitchell, 322 U. S. 65 (1944);
Upshaw v. United States, 335 U. S. 410 (1948);
Mallory v. United States, 354 U. S. 449 (1956).

A thorough discussion of the development of the non-constitutional test of confessions in federal courts is given in the article: "The McNabb-Mallory Rule: Its Rise, Rationale and Rescue," by James E. Hogan and Joseph M. Snee, S. J., in 47 Georgetown Law Journal 1, 1958. The authors point out *inter alia* the number of different types of court-approved necessary delays in arraignments before the commissioner.

Appellee also strongly recommends the Report of the Committee on the Judiciary of the United States Senate entitled "Improving Federal Law Enforcement and Administration of Justice." (S. Rept. No. 1478, 85th Cong., 2d Sess. (1958)), wherein the problem is studied and discussed including the views of Judge Alexander Holtzoff who served as secretary of the Supreme Court's Advisory Committee on the Federal Rules of Criminal Procedure.

The nearest United States Commissioner in the instant case is Theodore Hocke, who has offices in the Federal Building, and he testified that his office hours are from 9:00 A.M. to 4:30-5:00 P.M. [R. Tr. p. 682.] Thus, the instant case is distinguishable from *Mallory* in that here there was no commission available, and appellant Cook was advised of his right to remain silent and to obtain counsel before he voluntarily confessed.

In *United States v. Mitchell, supra,* the Court held that only a confession obtained during illegal detention is inadmissible and all pre-arraignment confessions are not automatically bad, and upheld the admissibility of the pre-arraignment confession therein.

Appellee urges this Honorable Court to follow its own lead as set forth in such cases as:

United States v. Leviton, 193 F. 2d 848 (2d Cir., 1951), cert. den. 343 U. S. 946 (1952);

Haines v. United States, 188 F. 2d 546 (9th Cir., 1951), cert. den. 342 U. S. 888 (1951);

Symons v. United States, 178 F. 2d 615 (9th Cir., 1949), cert. den. 339 U. S. 985 (1950);

United States v. Walker, 176 F. 2d 564 (2d Cir., 1949). cert. den. 338 U. S. 891 (1949).

Appellee also cites the following cases as correctly applying the law:

Washington v. United States, 258 F. 2d 696 (D. C. Cir., 1958);

Porter v. United States, 258 F. 2d 685 (D. C. Cir., 1958);

Trilling v. United States, 260 F. 2d 677 (D. C. Cir., 1958).

Appellee concludes that appellant Cook's confession was properly received in evidence as an extrajudicial confession, voluntarily given, while he was being lawfully detained.

VI.
CONCLUSIONS.

1. The search and seizure at apellant Williams' home, was legal, as incident to a lawful arrest, and the property so obtained was properly admitted into evidence.

   a. The agents had authority to arrest without a warrant of arrest.

   b. The agents had probable cause to believe that appellants had and were committing felonies.

   c. The agents arrested appellants immediately upon their entrance into appellant Williams' home.

   d. The arrests of appellants are valid under either federal law or California law.

   e. The search and seizure was incidental to the arrests.

   f. The scope of search and seizure was reasonable.

   g. Appellant Cook has no standing to object to the search and seizure.

   h. The property seized was admissible into evidence including the non-narcotic property.

2. The officers' testimony regarding the arrests of the appellants was true and unimpeached.

3. The Government disclosed the identity of the confidential informant.

4. The evidence is sufficent to sustain and support the conviction.

5. Appellant Cook's confession was properly admitted into evidence.

Respectfully submitted,

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No. 16256

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH JOHNSON WILLIAMS and FRED COOK, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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TOPICAL INDEX

which is wholly consistent with innocence and does not even raise a suspicion of guilt. Out of these insignificant happenings between appellant Williams and defendant Smith, the Government attempts to build up a case on Count Eight, the conspiracy count. However, the build-up fell with Juanita Smith's acquittal on the conspiracy count and the other two counts in the indictment in which Juanita Smith was charged with substantive offenses alleged as overt acts of the conspiracy.

Appellee does not contend that Ruth Williams ever saw or knew or had any connection, directly or indirectly, with defendant Bryant. The slight connection between Juanita Smith, arising out of the visit by Ruth Williams to Juanita Smith's home, is not indicative of a criminal purpose of any sort. As said before, the relevancy of the visit of Ruth Williams to Juanita Smith's home vanishes with the acquittal of Juanita Smith on Count Eight, the conspiracy count, and the two substantive counts, Counts Two and Three, under which Juanita Smith was indicted.

It is related in appellee's STATEMENT OF FACTS (Appellee's Br. pp. 15-16) that the officers saw defendant Bryant, February 21, 1958, enter the gate through the brick wall at 5417½ South Wilton Place, Los Angeles, which is the entrance to Ruth Williams' home off the alley connecting Cimarron Street and South Wilton Place; and that shortly thereafter the officers saw defendant Bryant leave the alley alongside 5417½ South Wilton Place. That is the sole evidence of the Government to connect appellant Ruth Williams with defendant Bryant.

There is complete agreement between the witnesses for the Government and those of appellants that the gate

which the officers saw Bryant enter was the entrance to a small yard from which one entering the gate could go up the steps on the side wall of the old garage to Ruth Williams' upstairs living quarters. It is not claimed that Bryant went up those steps. Unless Bryant had gone up the steps she could not have been seen by the officers as the gate is a solid one and it closes an opening through a five to six foot brick wall which would obscure her from view unless she did take to the steps. From the small yard there are entrances to four other apartments which constitute a flat building owned by Ruth Williams. There is also egress from this yard around a sharp corner of the garage to another small yard on the south side of the building which is Ruth Williams flower garden. Adjacent to the second yard is a walkway running all along the south side of the flat building and joining on to Wilton Place on the east and a long alley on the west. At the west end of this walkway are the 8 or 10 trash cans which were used by Ruth Williams and the other four tenants in her flat building. It was in one of these trash cans that the alleged narcotic was found upon the search, February 24, 1958, conducted by federal narcotics officers Malcolm Richards and William C. Gilkey pursuant to the search warrant issued earlier that day by Commissioner Hocke. (Appellants' Br. Appx. 1-5.) All of those things occurred prior to February 24, 1958, when the search, seizure and arrest of appellants were said by the officers to have been made.

Nothing appears in appellee's STATEMENT OF FACTS relating to appellants Ruth Williams or Fred Cook (Appellee's Br. p. 18) until Ruth Williams was seen to walk down the steps on the side wall of the garage apartment around 1:00 in the afternoon of February 24. She went

into the small yard between her living quarters and the other flats and disappeared from view for a short time from the view of the watching officers in the area of the other yard, which was not visible from where the officers said they were staked out. She returned a short time later to her apartment. It is entirely consistent with innocence that Ruth Williams, a home and flat owner at the address mentioned, should walk around her own premises without incurring suspicion.

It was conceded by the Government witnesses that *Jesse Thomas,* the phantom informer, disappeared after he set up the deliveries of heroin from defendant Bryant to Deputy Sheriff Burley, and after he had informed the police, so they said, that Ruth Williams was selling narcotics from her home at 5417½ South Wilton Place, Los Angeles, and that she was a source of heroin for defendant Bryant. The phantom informer has not been heard from since. The officers stoutly denied that they knew where he was at the time of the trial, or where he had lived before the trial. There is nothing in the record except this unsatisfactory testimony of the officers to show that there was any such person as *Jesse Thomas. Jesse Thomas* apparently was a fictitious name in the same category as John Doe was in *Roviaro v. United States,* 353 U. S. 53, 77 S. Ct. 623. The phantom informer is *conceded by the Government to have been a participant in the offenses charged in the indictment.* (Appellee's Br. pp. 9-11.) In these circumstances, *Jesse Thomas'* real identity had to be revealed, as he was a material witness for the defense, or the indictment dismissed.

Roviaro v. United States, supra;
People v. Williams, 51 Cal. 2d 355;
People v. Durazo, 52 A. C. 367.

It is said in appellee's STATEMENT OF FACTS that the officers saw appellant Cook (Appellee's Br. pp. 18-19) make two trips between appellant Williams' home and defendant Bryant's home, February 24, carrying the same clothing on both trips. Cook is a nephew of Mrs. Williams. Cook worked at the Wadsworth General Hospital five days a week. Cook was employed by his aunt, Mrs. Williams, on his day off from the hospital as a helper around the flat. The outstanding fact here is that there is not a word of direct testimony in the record that either Ruth Williams or Fred Cook ever at any of the times laid in the indictment against them had in their possession or the possession of either of them any narcotic or that they or either of them ever transported any heroin or ever sold any heroin. The testimony of the officers that defendant Bryant was seen to go in the gateway to Ruth Williams' combination home and flat building, that Ruth Williams was seen walking down the steps from her apartment and moving around the yard of her home and that Fred Cook who was employed by her went from her house to the house of defendant Bryant raises nothing more than a suspicion of guilt even though appellant Williams had a prior narcotics conviction. Outside of the heroin seized from the trash cans in the back of the flat building owned by Ruth Williams and the $15 in marked currency seized from the purse of Ruth Williams and the confession of Fred Cook, the foregoing constitutes all of the evidence tending to connect appellants Williams and Cook with the offenses charged against them in the indictment. The evidence is clearly insufficient to sustain the verdicts against appellants as the evidence does nothing more than predicate guilt upon mere nebulous association which gave rise to a suspicion in the minds

of the jury that appellants were guilty of the charges made against each of them in the indictment. (Appellants' Br. Point V, pp. 57-61.) This case is brought squarely within three recent cases from this Court cited to this point on page 59 of appellants' brief.

Ong Way Jong v. United States, 245 F. 2d 392;
Evans v. United States, 257 F. 2d 121;
Robinson v. United States, 262 F. 2d 645.

This Court said at page 126 of the *Evans* case that:

"There is, of course, evidence of an intimate personal relationship between William and Josephine, who handled the heroin in question. *But guilt may not be inferred from mere association.* Ong Way Jong v. United States, 9 Cir., 245 F. 2d 392, 394.

* * *

"It is no doubt true that the evidence as to William's association with Josephine, and as to his own past record of convictions, *gives rise to a suspicion that he conspired with Josephine regarding the transaction of March 4, 1957. But a suspicion, however strong, is not proof, and will not serve in lieu of proof.* Ong Way Jong v. United States, supra, 245 F. 2d 394."

Appellee states in its brief, page 19, that after the occurrences here outlined it was about 3:00 P.M. on February 24, and that *"the agents were ready for the final scene."* (Appellee's Br. pp. 19-21.) At 3:00 P.M. on the afternoon of February 24 federal narcotic agent Malcolm Richards accompanied by Deputy Sheriffs Landry, Farrington and Gillette, went up the steps on the side wall of Ruth Williams' garage apartment, opened the

door, and entered her apartment without saying a word. Federal Agent Richards was armed with a search warrant and, in spite of what the officers say, the record is clear that Ruth Williams' living quarters were entered under the authority of the search warrant which was held by Judge Mathes to be void. What occurred at 3:00 P.M. is fully set forth under III, STATEMENT OF THE CASE, pages 8 to 22 of appellants' brief. The subject is fully argued under POINT I of appellants' brief, pages 35 to 50, to which reference is here made in order to avoid repetition. While it was conceded by the officers that the quarters of Ruth Williams were searched pursuant to the void search warrant (Appellants' Br. Appx. pp. 1-5) and the evidence seized, upon which the conviction of both appellants rests, the Government, when it was caught in such an invidious position with the void search warrant on its hands, shifted its position to the claim that the search and seizure was incident to a valid arrest. The claim is entirely without foundation and apparently was not made in good faith by the federal narcotics officers at the time of the trial. (Appellants' Br. Appx. pp. 1-5.) Much force is lent to the contention of appellants, that the claim of the narcotics officers that the search and seizure was made pursuant to the alleged arrest, is baseless from the STATEMENT OF FACTS in appellants' brief which fails to contravert a single fact related by appellants in their STATEMENT OF THE CASE, pages 8-22 of appellants' brief. (Subdiv. 3, Rule 18 of the 9th Cit.)

II.

The Claim of the Federal and State Narcotics Officers That They Entered Ruth Williams' Home for the Purpose of Arresting Her Is Not Made in Good Faith as the Record Contradicts the Claim and Shows Without Conflict That Federal Narcotics Officer Malcolm Richards, Who Was in Command of the Expedition, Was Armed With a Search Warrant Which He Had Procured in the Morning of February 24 and That the Premises Were Entered and Searched Pursuant to the Search Warrant Which Was Later Held by Judge Mathes to Be Void.

The circumstances under which the arrest of both appellants Williams and Cook was made are fully covered under appellants' STATEMENT OF THE CASE in their brief, pages 8 to 22. We again refer to the failure of appellee to controvert any of the facts detailed in appellants' STATEMENT OF THE CASE.

The law upon which appellants rely to sustain their contention that the search was made under the void search warrant, and not as the appellee contends pursuant to the alleged arrest, is shown under POINT I OF ARGUMENT in appellants' brief, pages 35 to 50. It is apparent that the record digested under POINT III[3] of appellants' brief, pages 52 to 57, so hurt and weakened the Government's case and frustrated Counsel for the Government that they resorted to an exhibition of anger

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[3]"The United States Commissioner's File Demonstrates That the Testimony of the Officers, Relating the Circumstances of the Alleged Arrest of Appellant Williams and the Search of Her Home as an Incident to That Arrest, Is Untrue."

and unwarranted attack upon the good faith of appellants' Counsel. It is stated in appellee's brief at page 57:

> *"It is obvious that appellants have no compunctions about calling anyone a liar if it suits their convenience and that they are dedicated to the slogan, 'Win at all costs.'"*

The above quotation is taken from POINT Two under ARGUMENT in appellee's brief. (Appellee's Br. p. 57.) Appellee, when presenting its grouping of the contentions made in appellants' brief, says at page 9 of appellee's brief that:

> "3. The government witnesses *lied* regarding the arrest of appellant Williams as proved by the United States Commissioner's file."

Appellee, when making its regrouping of appellants' contentions under ARGUMENT, page 22 of appellee's brief, includes in its regrouping the following:

> "5. The *lies* of the Government's witnesses."

The word, "lie," or "lied," is not used in appellants' brief and we challenge Counsel for the Government to produce a single statement in appellants' brief from which an inference may be drawn to support appellee's claim that the appellants contended in their brief that the Government's witnesses lied. However, we do not desire to take the sort of exception to the untruthful assertions by Government's Counsel, which we are probably privileged to take, by moving to strike the objectionable matter. We are content to have the Government use the term, "lied," as applicable to its own witnesses, as upon due reflection we feel that the term is more descriptive of the testimony of the Government's witnesses than the

mild charge in appellants' brief that the Commissioner's file (Appellants' Op. Br. Appx. pp. 1-5) proves that the Government's witnesses' testimony could not be true. We feel that by giving the intemperate remarks of counsel this sort of treatment we are but aligning ourselves with the holding of the Supreme Court in *McDonald v. United States,* 335 U. S. 451, 456, 69 S. Ct. 191, 193, where that Court said:

> *"History shows that the police, acting on their own, cannot be trusted."*

We perceive no answer in appellee's brief to our POINTS I and III under ARGUMENT in appellants' brief, beginning at page 35 and ending at page 52, that the search and siezure were made *solely on the void search warrant* and that actually *there was no arrest at all of either of the appellants until the following morning, February 25, after the defendants had been booked the night before.* Warrants were then issued and the appellants were arrested. (Appellee's Br. p. 21.)

Appellee tries to avoid the effect of the uncontestable written evidence that Ruth Williams' home was searched pursuant to the search warrant and the articles seized under that search warrant and return made thereon, by saying that appellants do not attack the affidavits attached to the search warrant. The search warrant was held void in a formal written order entered by Judge Mathes. The affidavits were an integral part of the order. [Clk. Tr. pp. 35-37.] Paragraph 3 of Judge Mathes' order reads:

> "That the 'search warrant' obtained on February 24, 1958, by certain law enforcement officers to search 5417½ South Wilton was *wholly inadequate*

and insufficient on its face and such a warrant standing alone could not justify the search of defendant Ruth Johnson Williams' residence, made on February 24, 1958."

It appears from Judge Mathes' order that the Government's claim, that appellants did not attack the affidavits to support the search warrant, is ill-founded. The search warrant being void on its face, as Judge Mathes held, all of it, including the affidavits, was void.

Giordenello v. United States, 357 U. S. 480, 78 S. Ct. 1245.

One other point raised in appellee's brief requires mention. At pages 35, *et seq.,* of its brief appellee seems to contend that the legality of the arrest depends upon the law of California, as the arrest was made in that state. Appellee's point has no merit. California has adopted the exclusionary rule. (See p. 33 of Appellants' Op. Br.) All of this contention of appellee is beside the point. Federal narcotics officers Richards and Gilkey actively participated in the arrest; in fact, the group of officers was under the command of Federal Agent Richards. Participation by a federal officer, however slight, in an arrest, makes the operation a federal one, controlled solely by the Federal Rules of Criminal Procedure and federal statutes on the subject. (See Appellant's Op. Br. pp. 48-50.)

Appellee seems to have missed the point entirely, namely, that the home of Ruth Williams was entered by the officers without stating their purpose or authority, as required by 18 U. S. C. A., Section 3109. It was held in *Miller v. United States,* 357 U. S. 301, 78 S. Ct. 357, that a peace officer, whether he arrests by virtue of a

warrant or by virtue of his authority to arrest without a warrant on probable cause, can enter a home to make an arrest only after first stating his authority and purpose for demanding admission. The stealthy entrance of the federal and state officers here violated the rule of the *Miller* case and Section 3109, U. S. C.

It was held in *Jones v. United States,* 357 U. S. 493, 78 S. Ct. 1253, that probable cause for belief that certain articles, subject to seizure, are in a dwelling is not sufficient to justify a search of the dwelling without a warrant. The law, with respect to entering a home to make an arrest without a warrant of arrest and entering it to make a search without a search warrant is the same in both cases.

The error in admitting the confession of appellant Cook is fully covered at pages 60-61 of Appellant's Opening Brief. However, it might be well to mention that since the illegally seized heroin was admitted into evidence against Cook, his conviction should be reversed on that ground alone.

McDonald v. United States, 335 U. S. 451, 69 S. Ct. 191.

Then, too, the recent case of *Giordenello v. United States, supra,* holds that where evidence illegally seized has been introduced against a defendant, his admission of the crime will not save his conviction from a reversal.

Appellee claims that the federal and state officers entered Ruth Williams' home for the purpose of arresting her. (Appellee's Br. pp. 19-21.) The claim establishes the invalidity of the arrest under California law.

People v. Cahan, 44 Cal. 2d 434;

Badillo v. Superior Court, 46 Cal. 2d 269;

Gascon v. Superior Court, 169 A. C. A. 367 (hear. den. by S. Ct.);

People v. Harvey, 142 Cal. App. 2d 728 (hear. den. by S. Ct.);

People v. Harris, 146 Cal. App. 2d 142 (hear. den. by S. Ct.);

People v. Lawrence, 149 Cal. App. 2d 435 (hear. den. by S. Ct.).

Appellants respectfully contend that the judgment of conviction of each of them should be reversed.

Respectfully submitted,

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No. 16256

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH JOHNSON WILLIAMS and FRED COOK, JR.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR REHEARING.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 16256

IN THE

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RUTH JOHNSON WILLIAMS and FRED COOK, JR.,
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APPELLANTS' PETITION FOR REHEARING.

To the Honorable, the United States Court of Appeals for the Ninth Circuit and to the Honorable Oliver D. Hamlin, Jr., to the Honorable Gilbert H. Jertberg, Judges of said Court, and to the Honorable William J. Lindberg, Judge of the United States District Court:

I.
Status of the Case.

Appellants petition this Honorable Court for a rehearing of its decision rendered December 21, 1959. Particularly referring to appellant Williams, said decision affirmed a Judgment convicting appellant Ruth Johnson Williams on four counts of an indictment charging her in one count of the sale of heroin, in a second count of receiving, concealing and facilitating the transportation of heroin, in a third count of receiving, concealing and

facilitating the concealment of heroin, and in a fourth count of conspiring with Smith and Bryant to sell, receive, conceal and facilitate the transportation and concealment of heroin, and certain overt acts, in violation of Title 21 U. S. C., Section 174, and Title 18 U. S. C., Section 371. The Appellant Williams was sentenced to ten years on each of three of the counts, and to five years imprisonment on the fourth count, all sentences to run concurrently, together with payment of an aggregate fine of $5,000.00.

II.

Grounds for a Rehearing.

In devoting, as we do, the present Petition largely to matters relating to the legality of the arrest and of the search and seizure, antecedent to the arraignment of the Appellants, we wish concurrently to advise this Honorable Court that each and all of the several grounds the subject of appellants' previous briefs filed herein continue to be urged and maintained. It is not our wish, however, further to burden the record with argument on those points, since it is our belief that argument has amply been presented to this Court thereon.

A further discussion of the arrest, search, and seizure matters is desirable, we believe, not only in view of the newly reported case of *John Patrick Henry v. United States,* 80 S. Ct., 168, ... U. S. ...., decided November 23, 1959, but also because we believe clarification of our position with respect to these matters is necessary.

A principal question for determination in this case is whether the conviction can stand in view of the fact that, as we assert, both the search and the arrest, antecedent to arraignment of the appellant, were illegal, and timely mo-

tions to suppress the same were repeatedly made and urged, and, we believe, the record protected in that respect. In order to bring these issues into the sharpest possible focus, a brief review of the chronology is here set out:—

1. According to the testimony of Government witness Deputy Sheriff Gillette, one of the claimed arresting officers testifying on appellant's motion to suppress evidence before Judge Mathis [Rep. Tr. pp. 286, 289-290], the officers "had information from a reliable confidential informant who stated she (Appellant Williams) was selling narcotics from that location (5417½ South Wilton Place, Los Angeles, California), and that she (Williams) was a source of supply for Jewel Bryant." (See Appellee's Br. p. 25).

Deputy Gillette further claimed, in testifying at the trial: "I had information from a confidential informant, from Jesse Thomas, to the effect that Ruth Williams who lived at 5417½ Wilton Place, was engaged in the illegal sale of narcotics." [Rep. Tr. p. 238.]

2. Arguendo, and solely for purpose of analysis, taking the testimony of Government witnesses as if true, we are told that one Justin B. Burley and Malcolm P. Richards, a Federal narcotics agent, appeared on February 24, 1958, before United States Commissioner Theodore Hocke, and made affidavits for search warrant of the premises known as "5417½ South Wilton." (Appendix*, pp. 1-3). The purported search warrants issued by Commissioner Hocke, and thereafter held to be void by Judge Mathes, was delivered then to Federal narcotics officer Malcolm P. Richards, (Appendix, p. 4).

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*"Appendix" used herein refers to the Appendix to Opening Brief of Appellant.

3. Federal narcotics agent Richards and Federal narcotics agent Gilkey, with Deputy Sheriffs Burley and Landry and Gillette, proceeded to the home of appellant Williams at 5417½ South Wilton Place, Los Angeles, California. [Rep. Tr. pp. 473, 539.] Armed with the search warrant, Federal narcotics officers Malcolm P. Richards and William C. Gilkey, accompanied by Deputy Sheriffs of Los Angeles County, Arthur Gillette, A. F. Landry, and William R. Farrington, entered the home and premises of Ruth Williams. There, according to the position taken by the Government, they purported to arrest Ruth Williams, and proceeded to search the premises and seize various objects.

4. From the officers' version of what happened, the officers left Ruth Williams' home about 5:00 on the afternoon of February 24th, taking appellants William and Cook with them. Appellants were taken to the narcotics office in the Federal Building at Los Angeles and detained there for approximately three hours, when they were booked in Los Angeles County Jail on suspicion of trafficking in narcotics.

5. On February 25th, the following day, the officers made their return on the purported search warrant, to which Malcolm P. Richards made affidavit before Commissioner Hocke. That affidavit contains the following sworn statements of Richards, among others (Appendix, p. 5), as follows:

> "I received the attached search warrant 2-24-1958, and have executed it as follows:
>
> On 2-24, 1958, at 3:00 o'clock P. M., I searched (the premises) described in the warrant and
>
> I left a copy of the warrant with Mrs. Ruth J. Williams (name of person searched or owner at place

of search) together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant: (here follows the inventory of the property seized)

* * * * * * *

This inventory was made in the presence of Agent Wm. Gilkey, Sgt. A. F. Landry, Deputy Sheriff and William Farrington & Arthur Gillette, Deputies.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ MALCOLM P. RICHARDS,

Subscribed and sworn to before me this 25th day of February, 1958.

/s/ THEODORE HOCKE,
United States Commissioner."

(Appendix, pp. 4, 5).

6. Therafter, on that same day, February 25th, Malcolm Richards appeared before Commissioner Hocke and swore to a complaint against appellants Williams and Cook, charging them with the sale and facilitation of the sale of heroin [Tr. p. 1].

7. Commissioner Hocke then issued a warrant for the arrest of appellants Williams and Cook, the warrant being directed to the United States Marshal, or other authorized officer.

8. The return on the warrant indicates that someone went over to the County Jail and brought appellants Williams and Cook to the Federal Building to Commissioner Hocke's office, where they were arrested by United States Marshal on February 25, 1958. [P. 2.]

With respect to that sequence, we respectfully submit that this Honorable Court, in determining whether the proceedings shall be sanctioned, should view them in relation to our position taken with respect to these questions:

(a) Where, admittedly, the search and seizure was made "pursuant to the warrant" (Appendix, pp. 4-5) can the validity of the *search* be deemed to rest on anything other than the purported search warrant. We submit that, the latter, being void, the search *necessarily* was without validity, and the proceedings below without validity as well, and reversible. The Government, in view of all the circumstances that is, cannot shift over to the "incident to lawful arrest" basis.

(b) Since the very existence of the colorable search warrant and the use made thereof by the officers, and the affidavit made thereupon in the return thereon by the officers, all commit the Government to the position that their case was taken before the magistrate on February 24th, at which time the void search warrant was issued, can there here by any justification or excuse for *arresting* without a warrant for arrest? The officers obviously had the opportunity to appear before a United States Commissioner (since they did so and received the void search warrant). Such being so, that very appearance before the United States Commissioner negatives any excuse whatsoever for proceeding to make an arrest without a warrant. The arrest, inexcusably without a warrant, thus being illegal, the question must be answered in the negative, the proceedings below necessarily bear the

same stamp of illegality, and reversal is, we respectfully submit, required.

(c) If, rather than depending upon the void warrant for search, the search is to be justified on the basis of it being incident to a supposedly lawful arrest, then is not the Government, now depending upon the arrest rather than upon the void warrant, equally dependent upon a transaction without legal support? We refer to the ground set forth in the preceding paragraph. Accordingly, even were the Government, (committed by the affidavit of the deposing officer Richards in his return on the purported search warrant) able, in legal contemplation, to turn its back on the Richards affidavit and to arrest its search upon the arrest of appellant Williams, the Government thereby would obtain no support for the Government's alternate position. Setting aside the question of probable cause, there was no excuse for the lack of a warrant of arrest, nor any justification for lack of warrant of arrest.

If, indeed, it were held that an arresting officer, as here, may appear before a committing Magistrate, assert probable cause, receive a purported search warrant, and then proceed to make an arrest without a warrant of arrest, we respectfully submit that we would then have the ideal and perfect case to show that the Fourth Amendment to the United States Constitution, as it refers to warrants of arrest, now no longer has any meaning whatsoever.

(d) In view of the manner of entry by the officer, is not the *Miller* Decision, 357 U. S. 305, in fact fatal in itself to the judgment of conviction?

III.

Where, as Here, the Search and Seizure Were Avowedly Made "Pursuant to the Warrant" (See Appendix to Appellant's Opening Brief, pp. 4-5), the Validity of the Search and Seizure Rests Upon the Validity of the Warrant in View of All of the Circumstances; the Warrant Was Here Held Void; the Search Is Therefore Illegal and Reversal Is Required.

As this Court notes on page 13 of the Opinion herein, "the Trial Court held that the search warrant was void on its face." Further, as that opinion shows on page 17 thereof, the Federal narcotics agents are to be deemed "participating" in the search and seizure,—nor is this to be doubted in view of the records below.

For purposes of applicability of the Fourth Amendment to the United States Constitution, a search is a search by a Federal Official, if he has a hand in the search as a Federal enforcement officer, even on the chance that something will be disclosed of official interest to him as such agent.

Waldron v. United States (1955), 219 F. 2d 37, 95 U. S. App. D. C. 66.

Accordingly, the search of the Williams residence was, "a search by a Federal official," for purpose of applicability of the Fourth Amendment.

The early case of *Carroll v. United States,* 267 U. S. 132, 162, "liberalized the rule governing searches, when a moving vehicle is involved. . . ."

John Patrick Henry v. United States, 80 S. Ct. 168, ... U. S. ...., decided November 23, 1959.

However the *Carroll* case did not eliminate the need, in addition to probable cause, for justification for lack of a warrant. Not only must probable cause be present, but, as well, there must be some excuse or justification for the officer to proceed without warrant. That this is the law. Out of the essence of the Fourth Amendment, is further indicated from cases decided long after Carroll.

Jones v. United States, 78 S. Ct. 1253, 1256, 1257, 357 U. S. 493, 496-500 (decided June 30, 1958).

"Although it must be recognized that the basis of the two lower court decisions is not wholly free from ambiguity, a careful consideration of the records satisfies us that the search and seizure were considered to have been justified because the officers had probable cause to believe that petitioner's house contained contraband materials which were being utilized in the commission of a crime, and not because the search and seizure were incident to petitioner's arrest. So viewed, the judgments below cannot be squared with the Fourth Amendment to the Constitution of the United States and with the past decisions of this Court.

It is settled doctrine that probable cause or belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. *Agnello v. United States* 269 U. S. 20, 33, 46 Sup. Ct. 4, 6, 70 L. Ed. 145, *Taylor v. United States,* 286 U. S. 1, 6, 52 S. Ct. 466, 467, 76 L. Ed. 951. The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. See, e.g. *Johnson v. United States,* 333 U. S. 10, 14, 68 Sup. Ct. 367,

369, 92 L. Ed. 436; *McDonald v. United States,* 335 U. S. 451, 455, 69 Sup. Ct. 191, 193, 93 L. Ed. 153; *cf. Giordenello v. United States,* 357 U. S. 480, 78 Sup. Ct. 1245. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which implements the Fourth Amendment, but by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law enforcement officers justifies the issuance of a search warrant. Were Federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases and the protection it affords largely nullified.

The facts of this case impressively bear out these observations, for it is difficult to imageine a more severe invasion of privacy than the night-time instrusion into a private home that occurs in this instance. . . ."

Thus the *Jones* case directly refutes the proposition that a search without a warrant can be based merely upon probable cause, and places its grounds squarely upon the Fourth Amendment to the United States Constitution.

Clearly, in the instant case, there was no necessity or justification, within the Rule here reviewed, for a search of appellant's premises without a warrant, for there was the uncontrovertable opportunity to get a warrant. The officers had been before the magistrate to get a search warrant. Albeit void, the invalid warrant forecloses any justification for search without warrant.

We submit that this Court ought not to credit the Government's contention that, in spite of Officer Richard's affidavit constituting a representation by that Government officer to the magistrate, the search was based upon the assertedly previous arrest.

A similar approach was attempted in the *Jones* case. There, a valid search warrant had expired, and arrest was made and search was thereupon claimed to be incident to the arrest. Not supported by the search warrant, the Government wavered between *Scylla* and *Charybdis,*—between a claim of search—based—on—lawful—arrest, and unjustified search—without—warrant. Said the Court:

> "These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful night-time entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant for it could not have been sought, is consistent with the Fourth Amendment. . . ."
>
> *Jones v. United States,* 78 S. Ct. 1253, 1257, 357 U. S. 493, 500.

The very obtaining of a void search warrant precludes the Government from claiming any legality to the search on other purported grounds.

IV.

The Existence of the Void Search Warrant and Its Procurement by the Officers, and the Affidavit They Made Thereupon in the Return Thereon by the Officers, Show the Government's Position That Their Case Had Been Taken Before the Magistrate on February 24th, and Thus Shows the Full Opportunity to Procure the Same, or a Warrant of Arrest: There Can Be No Justification or Excuse for Arresting Without Warrant for Arrest; the Arrest Accordingly, Is Illegal.

The arrest, claimed by the Government to have occurred on February 24th, and leading to Federal prosecution, and in which Federal officers participated, must meet the tests of the Fourth Amendment to the United States Constitution.

Waldron v. United States (1955), 219 F. 2d 37, 95 U. S. App. D. C. 66;

Giordenello v. United States, 78 S. Ct. 1245, 357 U. S. 480.

Neither *Carroll,* nor *Rubinowitz,* are in point. *Carroll v. United States, supra,* "Liberalized the rule governing *searches* when a moving vehicle is involved. . . ." (Emphasis added.) *Henry v. United States, supra.* In *United States v. Rabinowitz,* 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed 653, the arrest was made on a valid warrant, and is of no moment here.

Nor is *Draper* in point. There, the arrest without a warrant was made when the defendant was seen to "alight from an incoming Chicago train and start walking 'fast' toward the exit . . . carrying a tan zipper bag. . . ." Assuming probable cause, the necessity

for immediate arrest was obvious, since the defendant was moving and was about to disappear. There was obviously no opportunity to get a warrant to arrest. *Draper v. United States,* 79 S. Ct. 329.

In the instant case, however, there was, as noted above, every opportunity to get a warrant. Indeed, preparations were avowedly extensive and long-planned. And here, more over, the appellants were in a dwelling place, as in *Jones v. United States, supra.* And, as Justice Douglas noted in *Henry v. United States, supra,* the *Carroll* case merely liberalized the rule governing searches when a moving vehicle is involved.

The recent case of *Giordenello v. United States,* 78 S. Ct. 1245, 357 U. S. 480, decided June 30, 1958, aligns itself with the rule requiring justification in addition to probable cause, and shows that that rule applies to arrests, just as much as to searches.

> "Petitioner was convicted of the unlawful purchase of narcotics . . . When petitioner left this residence, carrying a brown paper bag in his hand, and proceeded toward his car, Finley (agent of the Federal Bureau of Narcotics) executed the arrest warrant and seized the bag, which proved to contain a mixture of heroin and other substances. . . . Prior to trial, petitioner . . . moved to suppress for use as evidence the heroin found in the bag. In this Court, petitioner argues, as he did below, that Finley's seizure of the heroin was unlawful, since the warrant of arrest was illegal and the seizure could be justified only as incidental to a legal arrest, and that consequently the admission of the heroin into evidence was error which required that his conviction be set aside . . .

"Criminal Rules 3 and 4, provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged," and (2) showing "that there is probable cause to believe that (such) an offense has been committed and that the defendant has committed . . .'. The provisions of these Rules must be read in light of the Constitutional requirements they implement. The language of the Fourth Amendment, that " . . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing . . . the persons or things to be seized. . . ." of course applies to arrest as well as search warrants. See *Ex Parte Burford,* 3 Cranch, 448, 2 L. Ed. 495; *McGrain v. Daugherty,* 273 U. S. 135, 154-157, 47 S. Ct. 319, 323, 71 L. Ed. 580. The protection afforded by these Rules when they are viewed against their Constitutional background, is that the inference is from the facts which lead to the complaint '. . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States,* 333 U. S. 10, 14, 68 S. Ct., 367, 369, 92 L. Ed. 436."

Giordenello v. United States, 78 S. Ct. 1245, 1249-1250, 357, U. S. 480, 485, 486.

(It should be noted invalidity of the warrant was an ultimate basis for the Decision reversing the conviction in the *Giordenello* case.)

We submit that the Rule requiring (in addition to probable cause) justification for the lack of a warrant, ap-

plies equally to arrests as to searches. A summation of the cases reveals that this is the rule; it appears most clearly in the most recent cases. The requirement is Constitutional, and, it goes without saying, controls the construction of any statutory implementations.

V.

The Search, Claimed to Be Incident to the Arrest, Is Immediately Without Legal Support; Reversal Is Thus, We Submit, Required.

Thus, the arrest transaction claimed by the Government to have occurred on February 24th lacks justification, collides with the pronouncements of the *Henry, Jones* & *Giordenello* cases (we mention cases decided in 1958 and 1959), and is illegal. The arrest, on which the search is said to depend, is itself unexcused. This reminds us of the *Jones* case, *supra*:

> ". . . The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy . . ."
>
> *Jones v. United States,* 78 S. Ct. 1253, 1256, 357 U. S. 493, 496.

In any case, argument is not here required, we believe, that if the arrest is unlawful, it cannot support the search, the fruits of which are admitted into evidence over objection. We respectfully submit that reversal is indicated.

VI.

In View of the Manner of Entry by the Officers, We Contend That the Miller Decision Is in Fact Fatal in Itself to the Judgment of Conviction.

We respectfully submit that *Miller v. United States,* 78 S. Ct. 1190, 357 U. S. 566, invites reappraisal of its relation to this instant case.

As the Opinion of this Court in this matter states:

> "The officers entered the home of Mrs. Williams through the shut, but unlocked door, after knocking and receiving no response. When Mrs. Williams appeared, she was placed under arrest by a State officer, for violating the Federal Narcotics Laws. The lawfulness of the arrests of appellants, depends upon the power of arresting officer to enter the home of Mrs. Williams through an unlocked door, after knocking for several times and receiving no response, in order to arrest without warrants, persons whom the arresting officer had probable cause to believe were violating the Federal Narcotics Laws.
>
> The Federal Narcotics Officers *participating* in the enterprise had such authority under Title 26, U. S. C. A., Sec. 7607. . . ." (P. 17).

It was earlier noted, according to *Waldron v. United States* (1955), 219 F. 2d 37, 95 U. S. App. D. C. 66, "That a search is a search, by a Federal official, if he has a hand in the search as a Federal Enforcement Officer, even on the chance that something will be disclosed of official interest to him as such agent. It should be further noted that the criteria set forth in 18 U. S. C. A. Sec. 3109, and in California Penal Code Sec. 844, are substantially the same.

The Miller opinion states:

"Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission. The requirement was pronounced in 1603 in *Semayne's* case, 5 Coke, Co. Rep. 91 a, 11 Erc. 629, 677 Eng. Repr. 194, at 195: 'In all cases where the King and his party, (the sheriff if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . .' (The emphasis was supplied by Mr. Justice Brennan, speaking for the majority of the Court.)

Miller v. United States, 78 S. Ct. 1190, 1195, 357 U. S. 301, 309 (decided June 23, 1958.)

The Miller decision continued:

"The requirement stated in *Semayne's* case still obtains. It is reflected in 18 U. S. C. Sec. 3109, 18 U. S. C. A. Sec. 3109, in the statutes of a large number of States (here Justice Brennan, in footnotes, lists, among others, California Penal Code, Sec. 844), and in the American Law Institute's proposed Code of Criminal Procedure, Sec. 28. It applies, as the Government here concedes, whether the arrest was to be made by virtue of a warrant, or when officers are authorized to make an arrest for a felony without a warrant. . . ."

The opinion then refers to certain exceptional circumstances, which may excuse compliance, none of which, we believe, are applicable here. The opinion then continues,

> "The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case . . . But first, the fact that petitioner attempted to close the door did not of itself prove that he knew that the purpose was to arrest him. It was an ambiguous act . . ."

The majority opinion concludes:

> ". . . The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized, should have been suppressed. "Reversed."

The fact that the Miller decision indicated that the manner of arrest was unlawful under the District of Columbia, and thereupon reversed the conviction, is, we believe, authority for the proposition that where State and Federal Officers act in concert, the local law may create a *further* burden impressed upon the arresting officers; the reverse of this, however, we do not believe is true. If it is deemed that the local requirements are less burdensome than the Federal requirements, (as shown above, California requirements are similar) this does not, *ipso facto,* relieve the arresting officers of the burdens of the Federal requirements. Rather, we contend, in accordance with authorities cited above, that the burdens of Federal law remain, and impress themselves upon the arresting officers. The requirements of *Miller v. United States,* based as they are upon Federal as well as other authorities, extend to the

case at hand, and require a finding, we respectfully submit, that the manner of the arrest was itself unlawful; wherein all deference submit that its execution, in violation of the Rule stated in *Miller v. United States,* requires reversal, as was done in *Miller v. United States, supra.*

VII.

Appellants Suggest in Accord With Rule 23 of This Court, That a Rehearing Should Be Granted and That the Case Should Be Reheard En Banc.

Accordingly, and for each of the reasons stated herein, and as well for reasons stated in earlier briefs to this honorable Court, it is most respectfully contended, by these appellants, that the search and seizure were invalid, that the evidence introduced constituting the fruits thereof make the conviction reversible, that the search cannot find support in the asserted arrest, (since that in itself was necessarily unjustified), and that the manner of arrest itself was illegal to an extent itself, we most respectfully submit, requiring reversal.

For these reasons, we respectfully suggest to this Honorable Court that a rehearing should be granted and further suggest that the case be reheard *en banc.*

It is our contention that grave Constitutional questions here exist that might well justify the Court to order such a rehearing on the issues of this case.

Respectfully submitted,

WM. H. NEBLETT,
GERALD H. GOTTLIEB,
E. W. MILLER,
Counsel for Appellants.

Certificate of Counsel.

WM. H. NEBLETT, and GERALD H. GOTTLIEB, counsel herein for Appellants, certify that in their judgment, the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

WM. H. NEBLETT,

GERALD H. GOTTLIEB,

No. 16257

United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK N. MATTISON and IDA G. MATTISON,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Southern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—3-27-59

No. 16257

United States
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UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK N. MATTISON and IDA G. MATTISON,

Appellees.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court for the District of Idaho, Southern Division

Civil Action No. 3315

FRANK N. MATTISON and IDA G. MATTISON,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Plaintiffs, for cause of action, through their attorney allege:

I.

This action is of a civil nature for the recovery of individual income taxes arising under the revenue laws of the United States and brought under Sec. 1346(a)(1) of the Judicial Code (28 U.S.C. 1346 (a)(1)) as amended by act of July 30, 1954, c. 648, (68 Stat. 589).

II.

Plaintiffs were at all times here mentioned, and now are, husband and wife and citizens of the United States residing in Boise, Idaho, which city lies within the southern division of the District of Idaho. Under Sec. 1402 of the Judicial Code (28 U.S.C. 1402) venue lies in this court.

III.

On or before March 15, 1953, plaintiffs filed in the office of Calvin E. Wright, District Director, In-

ternal Revenue District of Idaho, Boise, Idaho, a joint income tax return for the calendar year 1952 and paid the tax shown thereon to be due.

IV.

During 1955 the Commissioner of Internal Revenue, after auditing plaintiffs' 1952 return, made certain adjustments in the computation of plaintiffs' 1952 income and by giving effect to these adjustments determined a deficiency of $69,257.45 in their reported income tax liability for that year. On June 21, 1956, the Commissioner (after giving effect to an alleged overpayment of plaintiffs' 1953 tax liability in the amount of $25,859.64) made a net assessment of additional income tax against plaintiffs in the amount of $43,397.81. Notice and demand was served upon plaintiffs requiring payment of these additional taxes, plus interest in the amount of $10,064.08, or the total amount of $53,461.89.

V.

On July 2, 1956, plaintiffs, pursuant to such notice and demand, paid to Calvin E. Wright, District Director of Internal Revenue, Boise, Idaho, the sum of $53,461.89.

VI.

The adjustments made by the Commissioner in recomputing plaintiffs' taxable income for 1952 were erroneous and illegal and the taxes and interest based upon the adjustments were illegally assessed and collected. By reason of these erroneous and illegal assessments plaintiffs overpaid their income

taxes for the calendar year 1952 by the sum of $43,397.81 and have paid to the District Director the sum of $10,064.08 in interest which was erroneously and illegally assessed.

VII.

On July 10, 1956, plaintiffs filed with the District Director of Internal Revenue, Boise, Idaho, a proper claim for the refund to them of the income tax and interest illegally and erroneously collected in the manner described in Paragraphs IV through VI hereof. A copy of such claim is attached to this complaint and incorporated herein. Six months have lapsed since the filing of such claim without the Secretary or the Commissioner having taken any action thereon, except that on August 20, 1956, the District Director mailed to the plaintiffs a report recommending disallowance of their claim.

VIII.

The erroneous adjustment made by the Commissioner in computing plaintiffs' tax liability for the year 1952 consisted of adding to their taxable income for that year the sum of $105,228.42, representing that portion of a gain in the amount of $126,099.78 which plaintiffs realized from the cancellation of 2,189 shares of stock owned by Frank N. Mattison in the Westcott Oil Company, an Idaho corporation. The Commissioner erroneously determined that said $105,228.42 was income to the taxpayers in 1952 and taxable to them at ordinary rates, when, in fact, $101,686.98 of such erroneously added income was

not received by plaintiffs or taxable to them until the calendar year 1953, and when, in fact the entire amount of such erroneously added income constituted long term capital gains. The proper taxes due in 1952 and 1953 on this $105,228.42 should be computed in accordance with the provisions of Sec. 117 of the Internal Revenue Code of 1939 as the plaintiffs had done in their return, but which the Commissioner failed and refused to do.

IX.

Plaintiffs have for many years reported their income to the Internal Revenue Service on the cash basis.

X.

In 1945 Frank N. Mattison acquired 25 shares of the capital stock of the Westcott Oil Company at a cost of $4,841.25. In June, 1952, Frank N. Mattison acquired the remaining 2,164 shares of the capital stock of this corporation from the other 18 stockholders at a cost of $1,347,480.57, making a total cost to him of $1,352,321.82 for the outstanding shares of this corporation.

XI.

On June 13, 1952, at a special meeting of the stockholders of Westcott Oil Company called for that purpose, a resolution calling for dissolution of the corporation was adopted. Frank N. Mattison turned in his shares for cancellation. As part of the process of liquidation during June, 1952, Frank N. Mattison received assets of the corporation having a value of $1,689,399.07 and assumed corporate obliga-

tions totaling $310,123.89. In connection with this transaction Mattison incurred costs totaling $3,677.07, realizing thereby a gain in the amount of $23,276.29 over the total cost basis of his shares. On their return for 1952 plaintiffs correctly reported Mr. Mattison's profit on this transaction as follows:

Short term capital gain.....	$ 8,865.29
Long term capital gain.....	14,411.00

XII.

On May 12, 1953, Westcott Oil Company made a further distribution in liquidation to Frank N. Mattison in the amount of $101,585.76, and on November 3, 1953, made a final distribution in liquidation to Frank N. Mattison in the amount of $1,275.90. In connection with these transactions Frank N. Mattison incurred expense in an amount of $38.17, realizing therefrom long term capital gain in the amount of $102,823.49, which plaintiffs correctly reported as such on their 1953 return.

XIII.

The Westcott Oil Company was organized in 1920 under the laws of the State of Idaho. For many years it conducted a large and prosperous business, doing business in most of the principal towns of southern Idaho, employing large numbers of people and owning large amounts of both real and personal property. Its president and dominant personality was C. J. Westcott.

At a special meeting of the stockholders called and held for that purpose on June 13, 1952, a reso-

lution was adopted authorizing and directing the officers and directors of the corporation to wind up its business, pay its debt, and distribute its remaining assets to its shareholder.

Pursuant to this resolution the Board of Directors, consisting of C. J. Westcott, Hugh Cramer, I. E. Westcott and J. R. Simplot, at a special meeting held on the same day, adopted a plan of dissolution which, among other things, provided for distributions to stockholders "at such times and in such amounts as the officers and directors deem advisable and expedient." Plaintiffs were neither officers nor directors of the corporation during the period of dissolution.

Thereafter its officers and directors proceeded to liquidate, dissolve and wind up the corporation and to distribute its assets to its sole stockholder as promptly as was reasonable and prudent so to do. In keeping with their responsibilities as such, the officers and directors of Westcott Oil Company authorized the distributions in liquidation referred to in Paragraphs XI and XII of this complaint.

On May 12, 1953, the corporation filed an application for voluntary dissolution in the District Court of the Third Judicial District of Idaho, in and for the County of Ada. After proper publication and hearing on June 19, 1953, the Honorable M. Oliver Koelsch, a judge of that court, entered an order dissolving the Westcott Oil Company. A certified copy of such order was filed with the Secretary of State of June 22, 1953.

XIV.

There is now due and owing plaintiffs the sum of $53,461.89 with interest thereon at the rate of 6% per annum from July 2, 1956, on account of income taxes overpaid for the year 1952. Notwithstanding plaintiffs' claim for refund thereof, no part of this amount which was unlawfully assessed and collected has been repaid or credited and there are no offsets or credits against the same.

Wherefore, plaintiffs pray judgment against defendant in the sum of $53,461.89 with interest according to law, and for their costs and disbursements in this action.

WOOLVIN PATTEN,

/s/ W. H. LANGROISE,

/s/ W. E. SULLIVAN,

Attorneys for Plaintiffs.

Duly verified.

Form 843
U. S. Treasury Department
Internal Revenue Service
(Revised July, 1953)

Claim

To Be Filed With the District Director Where Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

Refund of Taxes Illegally, Erroneously, or Excessively Collected.

Name of taxpayer or purchaser of stamps: Frank N. and Ida G. Mattison, 2002 North 21st Street, Boise, Idaho.

1. District in which return (if any) was filed: Internal Revenue District.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1952, to Dec. 31, 1952.

3. Kind of tax: Income Tax.

4. Amount of assessment, $53,461.89; dates of payment July 2, 1956.

5. Date stamps were purchased from the Government.....

6. Amount to be refunded $53,461.89.

7. Amount to be abated (not applicable to income, estate, or gift taxes) .....

The claimant believes that this claim should be allowed for the following reasons: See Attached Sheets.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated July 5th, 1956.

/s/ FRANK MATTISON,

/s/ IDA G. MATTISON.

Frank N. Mattison and Ida G. Mattison, his wife, are taxpayers reporting their incomes on a cash basis.

In 1945 Mr. Mattison acquired 25 shares in the Westcott Oil Company, an Idaho corporation. In June, 1952, he acquired the remaining 2,164 shares of this corporation, becoming its sole stockholder. This corporation was dissolved on June 19, 1953. In connection with the dissolution of the corporation, Mr. Mattison received the following amounts in excess of his cost basis of these shares:

June 27, 1952	$ 23,276.29
May 12, 1953	101,585.76
November 3, 1953	1,237.73

On their joint returns for 1952 and 1953 the taxpayers correctly reported their capital gains in this transaction as follows:

1952	Short term capital gain	$ 8,865.29
	Long term capital gain	14,411.00
1953	Long term capital gain	102,823.49

Mr. and Mrs. Mattison paid the correct amount of income tax due on these capital gains and upon their ordinary income for 1952 and 1953.

Upon audit, the Commissioner allocated the gain accruing to the Mattisons from the liquidation of the Westcott Oil Company as follows:

1952	Ordinary income or short term capital gain	$114,093.71
	Long term capital gain	10,869.56
1953	Long term capital gain	1,136.51

As a result of adding $105,228.42 to the Mattisons' taxable income for 1952, the Commissioner determined a tax deficiency as to that year in the amount of $69,257.45. As a result of decreasing the long term capital gain reported on their 1953 return by $101,686.96, the Commissioner determined an overpayment of tax in the amount of $25,859.64 as to 1953. On June 21, 1956, the Commissioner made a net assessment against the taxpayers in the amount of $53,461.89, consisting apparently of a net tax deficiency in the amount of $43,397.81 for 1952, and interest thereon in the amount of $10,064.08. This net deficiency and interest the taxpayers paid on July 2, 1956, to the Director of Internal Revenue for the District of Idaho.

The net assessment of $53,461.89 made by the District Director on June 21, 1956, against Mr. and Mrs. Mattison is an erroneous and illegal assessment in that it improperly adds $105,228.42 to taxable income in 1952 when, in fact, this profit was long term capital gain, $101,686.98 which was received in 1953 and $3,541.44 in 1952, all of which was entitled to the benefits of Section 117 of the Internal Revenue Code of 1939 in computing taxable net income.

Wherefore, the taxpayers respectfully request that the sum of $53,461.89 be refunded to them, together with interest to the date of payment.

[Endorsed]: Filed February 8, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, the United States of America, by and through its attorney Ben Peterson, the United States District Attorney for the District of Idaho, and for answer to the complaint of the plaintiffs admits, denies, and alleges as follows:

1. Denies the allegations contained in paragraph 1 of the complaint, except admits that this is a civil action for the recovery of income taxes alleged to have been overpaid, brought pursuant to 28 U.S.C. 1346(a)(1).

2. Admits the allegations contained in paragraph 2 of the complaint.

3. Admits the allegations contained in paragraph 3 of the complaint.

4. Admits the allegations contained in paragraph 4 of the complaint.

5. Admits the allegations contained in paragraph 5 of the complaint, except alleges that the sum of $53,461.89 was paid to the District Director of Internal Revenue at Boise, Idaho, on July 5, 1956.

6. Denies the allegations contained in paragraph 6 of the complaint.

7. Denies the allegations contained in paragraph 7 of the complaint, except admits that on July 10, 1956, the plaintiffs filed a claim for refund with the District Director of Internal Revenue at Boise,

Idaho, a copy of which is attached to the complaint. Defendant further admits that more than six months have elapsed since the filing of the claim for refund. Defendant further admits that on August 20, 1956, the District Director of Internal Revenue at Boise, Idaho, mailed to the plaintiffs a "30-day letter," in which a revenue agent recommended disallowance of the claim for refund. Defendant denies all matters contained in the claim for refund not specifically admitted herein.

8. Denies the allegations contained in paragraph 8 of the complaint, except alleges on information and belief that the adjustment made by the Commissioner of Internal Revenue in computing the plaintiffs' tax liability for the year 1952 consisted of adding to their taxable income for that year the sum of $103,457.70, representing that portion of a gain in the amount of $114,093.71, which the plaintiffs realized from the sale of assets acquired from Westcott Oil Co. Defendant further alleges that the Commissioner of Internal Revenue determined that $103,457.70 was income to the plaintiffs in 1952 and was taxable to them at ordinary income rates. The defendant admits that the plaintiffs received $101,-686.98 of that amount on May 12, 1953.

9. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint.

10. Denies the allegations contained in paragraph 10 of the complaint, except admits that in

1945 Frank N. Mattison acquired twenty-five shares of the capital stock of the Westcott Oil Co. at a cost of $4,841.25.

11. Denies the allegations contained in paragraph 11 of the complaint, except alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation relating to the special meeting of the stockholders of Westcott Oil Co. on June 13, 1952. The defendant admits that in 1952 Frank N. Mattison received the operating assets of the Westcott Oil Co. which he sold in 1952 for a total price of $1,689,399.07. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff assumed corporate obligations totaling $310,123.89. The defendant alleges upon information and belief that in connection with this transaction the plaintiff incurred costs totaling $3,671.12. Defendant admits that on their income tax return for 1952 the plaintiff reported a profit on this transaction as follows:

Short-term capital gain.....$ 8,865.29
Long-term capital gain.....$14,411.00

12. Denies the allegations contained in paragraph 12 of the complaint, except admits that on May 12, 1953, Frank N. Mattison was paid $101,585.76 by Westcott Oil Co. Defendant further admits that on November 3, 1953, Frank N. Mattison received a refund on an insurance policy held by Westcott Oil Co. in the amount of $275.90.

13. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Denies the allegations contained in paragraph 14 of the complaint, except admits that no part of the amount in suit has been repaid or credited to the plaintiffs.

Wherefore, having fully answered, the defendant prays for judgment in its favor against the plaintiffs, for the costs of this action and for all other relief which to the Court may seem just and proper.

/s/ BEN PETERSON,
United States Attorney.

Certificate of service attached.

[Endorsed]: Filed April 12, 1957.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Second Defense

As a second, separate and alternative defense, and without waiving any of the matters contained in its original answer, the defendant alleges:

1. If the gain derived by the plaintiffs from the transaction in question is determined to be properly taxable in 1953, it is properly taxable as short term capital gain in that year.

2. Wherefore, in that event, the defendant is entitled to offset against any amounts found to be due the plaintiffs for 1952, the taxes found to be owing it for 1953 by reason of the foregoing.

/s/ BEN PETERSON,
United States Attorney.

[Endorsed]: Filed September 9, 1957.

[Title of District Court and Cause.]

STIPULATION

It is agreed by and between the parties to the above-entitled action that the documents identified below are genuine and may be received in evidence as attachments to this stipulation for the purpose of this case. This Stipulation in no wise restricts the right of either party to introduce additional documentary evidence during its trial.

Exhibit A. Income tax return of Frank N. and Ida G. Mattison for the calendar year 1952.

Exhibit B. Income tax return of Frank N. and Ida G. Mattison for the calendar year 1953.

Exhibit C. Income tax return of Westcott Oil Company for the calendar year 1952.

Exhibit D. Income tax return of Westcott Oil Company for the calendar year 1953.

Exhibit E. Charter of Westcott Oil Company and amendments thereto.

Exhibit F. Petition, notice and order of dissolution of Westcott Oil Company.

Exhibit G. Offer and agreement between Mattison and Continental Oil Company dated May 12, 1952.

Exhibit H. Seventeen Option Agreements executed by Stockholders of the Westcott Oil Company in favor of Frank N. Mattison along with escrow instructions.

Exhibit I. Seventeen letters from Frank N. Mattison to stockholders of the Westcott Oil Company exercising the options attached as Exhibit H.

Exhibit J. Minute Book of Westcott Oil Company containing minutes of Stockholders meeting held on June 13, 1952, of Directors Meeting held on June 13, 1952, and Minutes of Directors Meeting held on April 28, 1953.

Exhibit K. Various documents dated June 16, 1952, conveying certain assets of the Westcott Oil Company to Frank N. Mattison.

Exhibit L. Various documents dated June 16, 1952, conveying certain assets from Frank N. Mattison and Ida G. Mattison to the Westcott Oil Corporation, a wholly owned subsidiary of the Continental Oil Company.

Exhibit M. Stock transfer Book of Westcott Oil Company.

Exhibit N. Three checks Westcott Oil Company, two dated March 12, 1953, and one dated May 12, 1953.

Exhibit O. Cash Book of the Westcott Oil Company for the period January 1, 1952, to May 12, 1953.

Exhibit P. Deposit slip dated June 27, 1952, and voucher describing deposit.

Exhibit Q. Deposit slip dated May 13, 1955.

Executed this 9th day of September, 1957, in Boise, Idaho.

/s/ WOOLVIN PATTEN,
Attorney for Plaintiffs.

/s/ BEN PETERSON,
Attorney for Defendant.

[Endorsed]: Filed September 10, 1957.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Plaintiffs, through their undersigned attorneys, for reply to defendant's second alternative defense and counterclaim, admit, deny and allege as follows:

1. Admit that the capital gain from the liquidation of the Westcott Oil Company was properly taxable to plaintiffs in 1953.

2. Deny that such capital gain is taxable as a short term capital gain in 1953.

3. Deny that defendant is entitled to offset any tax, in addition to the amount reported on plaintiffs' Return, which may be due in 1953 against any amount found to be due plaintiffs for 1952.

4. Allege that at all times between May 30, 1952, and May 12, 1953, Frank N. Mattison was the owner of all the outstanding stock of the Westcott Oil Company; that except for a short period of time when such shares were held in escrow in the First Security Bank, Frank N. Mattison had in his possession a valid certificate evidencing ownership of this stock, and that such shares were not cancelled until May 12, 1953.

5. Allege that plaintiffs' Return for the calendar year 1953 was filed with the District Director of Internal Revenue, Boise, Idaho, on February 23, 1954; that more than three years have elapsed since both the filing of such Return and the date upon which such return was required to have been filed by law, and that no assessment as to 1953 has been made, statutory notice issued, or suit begun within such three-year period.

6. That the assessment or collection of any tax in addition to the amount shown on plaintiffs' Return is now barred by Section 6501(a) Internal Revenue Code of 1954 (26 U.S.C. 6501(a)).

Wherefore, plaintiffs pray that defendant's counterclaim be dismissed.

/s/ W. E. SULLIVAN,

/s/ WOOLVIN PATTEN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 10, 1957.

[Title of District Court and Cause.]

MEMORANDUM OPINION

This is an action for refund of income taxes in the amount of $53,461.89, plus interest, allegedly overpaid by the taxpayer for 1952.

Plaintiffs, as husband and wife, filed joint income tax returns for the years in question and any reference to "taxpayer" or "Mattison" is intended to refer only to plaintiff, Frank N. Mattison.

The controversy is in regard to the method of taxing the gain which Mattison received as a result of the liquidation of the Wescott Oil Company.

The Westcott Oil Company was incorporated under the laws of the State of Idaho in 1920, and for over thirty (30) years was engaged in the business of selling gasoline and related petroleum products in the States of Idaho and Oregon. Up until 1926, the corporation was wholly owned by the Continental Oil Company. In 1926, C. J. Wescott, also known as Ike Westcott, acquired twenty (20) per cent of the stock of said corporation. Wescott then became President of the corporation, which position he held until its final dissolution in 1953. In 1945, the Continental Oil Company sold its stock to Wescott who resold a considerable amount of said stock to friends and business associates at the same price he had paid Continental. It was at this time that the taxpayer acquired twenty-five (25) shares of said stock. He was then Secretary-Treasurer of

the corporation and held such position between the years of 1929 and 1952.

In 1951, Wescott, in behalf of himself and the other stockholders, negotiated with Continental Oil Company to sell the stock of the Westcott Oil Company to Continental. Westcott's negotiations for a sale of the stock to Continental were unsuccessful. During some of the negotiations with Continental, Mattison had been present for the purpose of assisting Mr. Westcott. After Mattison learned that the negotiations had failed he approached Wescott in regard to purchasing the stock of the Wescott Oil Company at the price Wescott had been asking for it from Continental. Wescott and Mattison orally agreed that the shares could be acquired at such prices. Immediately thereafter, Mattison began negotiations for the sale of the physical assets of the Wescott Oil Company to Continental, if and when he acquired the same. After some negotiations, and on May 12, 1952, Continental executed a binding offer in favor of Mattison good for thirty (30) days, to purchase the physical assets of the Wescott Oil Company for $1 million, plus inventory.

After obtaining the agreement from Continental, Mattison approached the other stockholders of Wescott Oil and obtained options to purchase their shares in said corporation. These options were exercised on or about May 30, 1952, and pursuant to the terms of the option agreement, the shareholders of Wescott Oil Company deposited their shares with the First Security Bank of Idaho as

escrow holder. Wescott Oil Company issued a new certificate of stock in the name of Frank N. Mattison for a total of 2,189 shares. This certificate was for all of the stock purchased by Mattison from the other stockholders and the twenty-five (25) shares purchased by him in 1945. The new certificate was deposited with the escrow holder as required by the terms of the escrow instructions.

Mattison, being the sole stockholder of Wescott Oil Company, called a special stockholders' meeting for June 13, 1952, at which meeting it was resolved that the business of the corporation be discontinued; that the Officers and Directors proceed to wind up its business affairs; transfer its assets to the stockholder; and dissolve the corporation.

Immediately following the shareholders' meeting a special meeting of the Board of Directors was held, at which time Mattison resigned as Secretary-Treasurer of the corporation. At this meeting the Directors resolved that the operating assets be conveyed to Mattison by way of partial distribution. Soon thereafter, and on June 16, 1952, the Wescott Oil Company conveyed its operating assets to the taxpayer, who then reconveyed the same to a subsidiary corporation wholly owned by Continental Oil Company. At said time, Continental Oil Company paid Mattison by check, $1,400,000.00, which check was endorsed by Mattison and deposited with the bank, to be paid out according to the escrow instructions. The balance of the purchase price for

the operating assets of $289,399.07, was paid by the subsidiary corporation of Continental on June 27, 1952. Likewise, these funds were applied on obligations of Mattison according to instructions.

The certificate representing all of the stock of Wescott Oil Company issued to Mattison was released to him on June 16, 1952, with an endorsement thereon as follows: "June 16, 1952, partial liquidation made this date hereon by distribution to the above-named stockholder, Frank Mattison, of all the real and personal property, investments, fixtures, equipment, contracts, and other valuable rights and liabilities, and all merchandise, accounts and notes receivable of the company, excepting only cash and stock of Lilly Seed Co. This stock being hereafter nontransferable, all pursuant to stockholder's and directors' resolution of June 13, 1952."

Subsequent to the conveyance of the operating assets to Mattison and by Mattison to the subsidiary corporation of Continental, the Wescott Oil Company continued to wind up its business affairs until May 12, 1953, at which time the balance of the assets in the corporation were distributed to taxpayer and he, in turn, surrendered the certificate representing all the shares in the corporation, which was then cancelled. Wescott Oil Company was finally dissolved by a Court Decree on June 19, 1953.

During all of the period that the Wescott Oil Company was being liquidated and its business affairs wound up, Mattison was neither a statutory

officer nor a Director of the corporation. Mattison did not direct or control the liquidation and dissolving of the corporation.

Subsequent to the time the corporation was dissolved, and on November 3, 1953, Mattison received shares of stock in the Lilly Seed Company which he sold in 1955 for $1,000 and an insurance refund in the amount of $275.90. The $101,585.76 distributed to taxpayer on May 12, 1953, the insurance refund, and the fair market value of the Lilly stock was reported by the taxpayer as long term capital gain in 1953.

The 2,164 shares of stock of the Wescott Oil Company purchased by Mattison in May, 1952, cost him $1,347,480.57. The twenty-five (25) shares of stock acquired by him in 1945 cost $4,841.25. His total cost of all of the stock was $1,352,321.82. The physical assets of the corporation distributed to him by way of partial distribution in June, 1952, were sold for $1,689,399.07, and he assumed an obligation of the corporation in the amount of $310,123.89, representing a gain of $23,276.29, after expenses of $3,677.07, over the cost basis of his shares. This gain was reported by Mattison and his wife on a joint return filed for the year 1952.

As a result of the final liquidation of the corporation, Mattison received a total of $102,861.66 in May and November of 1953. This amount, received in 1953, Mattison and his wife reported, less expenses of $38.17, in a return filed for 1953. This gain was reported as a long term capital gain.

The Internal Revenue Service determined that the Mattisons owed additional income taxes for 1952, amounting to $69,257.45, and were entitled to a refund of $25,859.64 for the year 1953. As a result, the Director of Internal Revenue assessed a net deficiency of $43,397.81, plus interest in the amount of $10,064.08, which total of $53,461.89 as assessed was paid by the Mattisons. This suit is for the recovery of said amount, plus interest. There is no dispute between the parties as to the total amount of gain in the sum of $126,099.78 which Mattison received as a result of the liquidation of the Wescott Oil Company.

The plaintiffs contend that the gain should be paid as reported by them and that the $102,823.49 of the gain should be taxed as reported in 1953. It is first contended by the defendant, that all of this gain, except $2,273.04, should be taxed in 1952. As an alternate contention, the defendant claims that the gain should be allocated between the years, as reported, but taxed in 1953 as short term gains.

After fully considering the evidence and the excellent briefs filed herein, this Court favors the position of the plaintiffs.

The manner by which liquidating dividends are taxed to the individual shareholders receiving the same was provided for in Section 115(c) of the Internal Revenue Code of 1939:

"Distributions in Liquidation—Amounts distributed in complete liquidation of a corporation shall

be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock * * *"

Where several distributions are made in the process of completely liquidating a corporation the distributions received are first applied to reduce the cost basis of the stock and capital gain is only realized when the amount of the liquidating dividends exceed the cost basis. Arthur Letts, Jr., vs. Commissioner, 30 B.T.A. 800, affirmed (9 Cir.) 84 F.2d 760; T. T. Word Supply Company vs. Commissioner, 41 B.T.A. 965; Ludorff, et al., vs. Commissioner, 40 B.T.A. 32; Quinn vs. Commissioner, 35 B.T.A. 412. It has been concluded that this result may follow where the corporation is wholly owned by a single stockholder. Word Supply Company vs. Commissioner, supra; Lockhart vs. Commissioner, 8 T.C. 436; Mertens, Law of Federal Income Taxation, Vol. 1, § 9.74, n.20; cf. Hellman vs. Helvering, 68 F.2d 763. It appears to be the general rule that such gain is only realized and recognized when it is actually received by the shareholder. Northwest Bancorporation vs. Commissioner, 8 Cir., 88 F.2d 293; Dresser vs. United States, Ct. Cl., 55 F.2d 499; cf. Case vs. Commissioner, 9 Cir., 103 F.2d 283.

It is urged by the defendant that the foregoing statute and cases are not applicable in the instant case; that the nature of the transaction with which we are concerned is a unified plan to purchase assets for resale; that the corporate entity, therefore, must

be disregarded and the transaction taxed as a purchase and sale of assets and not as on the liquidation of a corporation under Section 115(c) I.R.C. 1939. In support of this contention the defendant cites Commissioner vs. Ashland Oil and Refining Company, 99 F.2d 558, cert. denied, 306 U.S. 61; Cullen vs. Commissioner, 14 T.C. 368; Kimbell-Diamond Milling Co. vs. Commissioner, 14 T.C. 74; affirmed 187 F.2d 718, cert. denied, 342 U.S. 827; Montana-Dakota Utilities Company vs. Commissioner, 25 T.C. 408; Snively vs. Commissioner, 19 T.C. 850, 219 F.2d 266.

On reviewing the cases cited by defendant this Court is of the opinion that they are not controlling here. To be of assistance in the case here, the holdings in said cases would have to be extended beyond their scope.

On the facts of this case the Court does not believe that a tax should be assessed against the taxpayer except in the manner provided generally for the taxation of capital gains in the complete liquidation of a corporation.

Although it is true that "the incidence of taxation depends upon the substance of a transaction," Commissioner vs. Court Holding Co., 324 U.S. 331, 65 S.Ct. 707, 708, it is not always easy to determine what is "form" and what is "substance." Here there can be no question but that the taxpayer purchased the stock and not the assets of the Wescott Oil Company. The taxpayer purchased the stock (other than the twenty-five (25) shares he already

owned) intending to liquidate the corporation, sell the assets, and thereby make a profit. There are no indications of wrongful acts or intentions on the part of the taxpayer or anyone else. If a taxpayer employs a lawful method of making a profit in a transaction he should be entitled to take advantage of any lawful method of salvaging as much of that profit as possible.

It does not appear that the taxpayer had any desire to acquire the assets of the Wescott Oil Company, as such, but only as part of his overall plan of acquiring the stock and liquidating the corporation at a profit. No authority has been cited and none found to the effect that merely because corporate stock is purchased with the intent of liquidating a corporation that then the general rules relating to the realization and reporting of capital gains and losses on corporate liquidations are no longer applicable. In the absence of good authority to that effect this Court is inclined to believe that the general rules applicable in such cases should be applied to determine the plaintiffs' liability.

It is argued in the alternative by the defendant that if the gain is properly recognized on the liquidation of the corporation, as contended by the taxpayer, that it should be treated as short term capital gain and not long term capital gain in the year it was actually received.

It is urged that the taxpayer's stock holding period terminated with the liquidating dividend of

June 16, 1952, which was made pursuant to a plan of complete liquidation executed on June 13, 1952.

Counsel for the defendant admit they have found no case which determines the event which terminates the holding period for the stock "exchanged" upon corporate liquidation. As pointed out by counsel for plaintiff, the cases cited by counsel for the defendant as lending support for such theory involve cases where title had passed from the taxpayer at the time the exchange was said to have taken place.

It is the clear implication of several of the cases involving the reporting of gains or losses realized on corporate liquidation that whether or not an amount received on an installment liquidation is long or short term gain is determined by the length of time that has passed between the purchase of the stock and the actual receipt of the amount on which gain is realized. Cf. Letts vs. Commissioner, supra. Here title to the stock did not pass when the first liquidating dividend was received by taxpayer pursuant to the plan of corporate liquidation and dissolution.

In accordance with the above and foregoing it is the opinion of this Court that plaintiffs properly reported the transaction in question for tax purposes and that they are entitled to a refund of the taxes paid under protest together with accrued interest thereon.

Counsel for the plaintiffs shall prepare Findings of Fact, Conclusions of Law, and a Proposed Judge-

ment, serve copies of the same on counsel for the defendant and submit the originals to the Court.

Dated this 2nd day of July, 1958.

/s/ FRED M. TAYLOR,
United States District Judge.

[Endorsed]: Filed July 2, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial without a jury before the Honorable Fred M. Taylor, a judge of the above-entitled court, on September 10, 1957; plaintiffs appearing by Willis E. Sullivan of Boise, Idaho, and Woolvin Patten of Seattle, Washington, their attorneys, and the defendant appearing by Ben Peterson, United States Attorney for the District of Idaho, and Thomas Foye, Attorney, Tax Division, Department of Justice, the parties having produced testimony and other evidence in support of their respective contentions as reflected in the pleadings filed herein, and the parties having submitted written briefs in argument, the Court being satisfied of its jurisdiction over the parties and the subject matter of this proceeding, having considered all the evidence and briefs herein, having rendered its memorandum opinion on July 2, 1958, and being fully advised in the premises, now makes the following:

Findings of Fact

I.

Plaintiffs instituted this action against the United States to recover $53,461.89 of the individual income taxes which they paid for the calendar year 1952 together with interest according to law. Jurisdiction for such action exists by reason of Section 1346(a)(1) of the Judicial Code, as amended. (28 U.S.C. 1346(a)(1).)

II.

Plaintiffs were and are at all times here pertinent husband and wife, citizens of the United States, and residents of Boise, Idaho. Venue in this court exists by reason of Section 1402 of the Judicial Code (28 U.S.C. 1402).

III.

Plaintiffs during the years here in question and for many years prior thereto filed income tax returns in the Internal Revenue District of Idaho on what is known as the cash basis. During the calendar years 1952 and 1953, plaintiffs filed joint returns. The only income reported on their returns for the calendar years 1952 and 1953, is that of the plaintiff Frank N. Mattison, and any reference to "Mattison" is intended to refer to Frank N. Mattison.

IV.

The only controversy between the parties is in regard to the proper method of taxing the gain which Mattison realized as a result of the liquidation of the Westcott Oil Company. References hereinafter

to the "Company" or the "Corporation" are intended to refer to the Westcott Oil Company.

V.

The Westcott Oil Company was incorporated under the laws of the State of Idaho in 1920, and for over 30 years engaged in the business of selling gasoline and related petroleum products in the States of Idaho and Oregon. Up until 1926, the Company was wholly owned by the Continental Oil Company. In 1926, C. J. Westcott, also known as "Ike" Westcott, acquired twenty (20) per cent of its stock. Westcott then became president of the Company, which position he held until its dissolution in June of 1953.

VI.

In 1945 Continental Oil Company sold it stock to Westcott who resold a considerable amount of said stock to friends and associates at the same price he had paid Continental. It was at this time Mattison acquired twenty-five (25) shares of said stock. He was then Secretary-Treasurer of the Company, which position he held between the years 1929 and 1952.

VII.

During the considerable number of years it was in existence, the Westcott Oil Company was a very successful business venture, earning sizeable profits and paying dividends. Its name was well known in Idaho and parts of Oregon.

VIII.

In about 1950, for business reasons which are not here particularly important, Mr. Westcott and the other stockholders resolved to dispose of their shares provided a satisfactory price could be obtained. Mr. Westcott on behalf of himself and the other stockholders undertook to find a buyer for these shares.

IX.

Mr. Westcott contacted several prospective buyers in an effort to dispose of the stock of the Westcott Oil Company. These negotiations were only for the sale of stock. No negotiations were ever undertaken by Mr. Westcott looking toward a sale of assets.

X.

In 1951, Mr. Westcott entered into negotiations with the Continental Oil Company for the sale of the stock of the Westcott Oil Company. For a while it looked as though these negotiations would be successful. An exchange of the shares of Westcott Oil Company for the common stock of Continental Oil Company was very nearly agreed upon, but failed of conclusion because of an increase in the quoted price of the stock of Continental. Mr. Westcott then undertook to negotiate a cash sale. Westcott demanded a price of $607.63 per share.

XI.

The price of $607.63 was arrived at as the price necessary to net the stockholders $500.00 per share after paying taxes on their capital gains computing such tax by the alternative method. This price was

simply the price which Mr. Westcott and the other stockholders wished to realize from the sale of their shares. There was no apparent direct connection between this price and the value of the operating assets of Westcott Oil Company except to the extent that the value of any corporation's shares has some relationship to its assets.

XII.

The negotiations of Mr. Westcott with Continental Oil Company failed because Continental was unwilling to pay the price demanded by the stockholders for their shares.

XIII.

Mattison, who was Secretary and Treasurer of the Westcott Oil Company, was present at some of the negotiations of Westcott with the Continental Oil Company for the purpose of assisting Mr. Westcott.

XIV.

Although Mattison was not present at the meeting between Westcott and Continental at which negotiations broke down, he soon learned this fact and in April of 1952, approached Mr. Westcott in regard to purchasing the stock of Westcott Oil Company at the same price Westcott had been asking for it from Continental, i.e., a price sufficient to yield approximately $500.00 per share after capital gains taxes.

XV.

Mr. Westcott and Mattison orally agreed that Mattison could acquire these shares at the same price

they had been offered to other prospective purchasers.

XVI.

Immediately after receiving this oral assurance from Mr. Westcott, Mattison began negotiations for the sale of the operating assets of the Westcott Oil Company to Continental, if and when he acquired them. After some negotiations, on May 12, 1952, Continental executed a binding offer in favor of Mattison good for 30 days to purchase the operating assets of the Westcott Oil Company for $1,000,000.00 plus inventory.

XVII.

After obtaining this purchase agreement from Continental, Mattison approached the other stockholders of the Westcott Oil Company and obtained written options to purchase their shares in said corporation. During the remainder of May, 1952, he obtained options from the 16 stockholders of the corporation other than himself and Mr. Westcott.

XVIII.

These options were exercised in writing on or about May 30, 1952, and pursuant to their terms the other stockholders of Westcott Oil Company deposited their shares with the First Security Bank of Idaho as escrow holder.

XIX.

On June 10, 1952, all the outstanding stock of the Westcott Oil Company except the shares owned by Mattison had been deposited with the First

Security Bank of Idaho. As was permitted under the escrow instructions, on June 10, 1952, Westcott Oil Company issued a new certificate of stock in the name of Frank N. Mattison for a total of 2,189 shares. This certificate represented all the stock Mattison had contracted to purchase from the other stockholders as well as the 25 shares purchased by him in 1945, and constituted all the outstanding stock of the company.

XX.

Mattison, being the sole stockholder of the Westcott Oil Company, called a special meeting of the stockholders for June 13, 1952, at which meeting it was resolved that the business of the company be discontinued, that the officers and directors proceed to wind up its business affairs, transfer its assets to the stockholder, and dissolve the company.

XXI.

Immediately following the stockholders' meeting, a special meeting of the Board of Directors of the Westcott Oil Company was held, at which time Mattison resigned as Secretary and Treasurer of the company. At this meeting, the Directors resolved that the operating assets be conveyed to Mattison by way of a partial distribution in liquidation.

XXII.

On June 16, 1952, the Westcott Oil Company conveyed its operating assets to Mattison, who then reconveyed the same to a wholly owned subsidiary of the Continental Oil Company.

XXIII.

As partial consideration for the conveyance to it of these assets, on June 16, 1952, Continental Oil Company issued Mattison a check for $1,400,000.00 which Mattison endorsed over to the First Security Bank of Idaho. The proceeds of this check were applied as follows: $265,000.00 paid on the obligation of the company to the bank which had been personally assumed by Mattison, and $1,135,000.00 paid out under escrow instructions to the selling stockholders.

XXIV.

The remaining $289,399.07 of the purchase price for the operating assets of Westcott Oil Company was paid to Mattison by the wholly owned subsidiary of Continental on June 27, 1952. The following disbursements were then made by Mattison: $45,123.89 in final payment of the Company's indebtedness to the First Security Bank personally assumed by Mattison, and $212,480.57 in final payment for the shares Mattison purchased from Mr. Westcott. After these disbursements, $31,794.61 remained available to Mattison for the payment of expenses and as gain.

XXV.

The certificate representing all of the stock of Westcott Oil Company issued to Mattison was released to him by the First Security Bank on June 16, 1952, and the following legend endorsed thereon:

"June 16, 1952, partial liquidation made this date hereon by distribution to the above-named stockholder, Frank Mattison, of all the real and personal

property, investments, fixtures, equipment, contracts, and other valuable rights and liabilities, and all merchandise, accounts and notes receivable of the company excepting only cash and stock of Lilly Seed Co. This stock being hereafter nontransferable, all pursuant to stockholder's and directors' resolution of June 13, 1952."

The certificate was then returned to Mattison who retained it in his possession until it was surrendered to the company for cancellation in June of 1953.

XXVI.

Subsequent to the conveyance of the operating assets of the Westcott Oil Company to Mattison and by Mattison to the subsidiary of Continental, the Westcott Oil Company continued to wind up its business affairs until May 12, 1953, at which time the balance of the assets of the company then consisting of cash in the amount of $101,585.76 were distributed to Mattison and he in turn surrendered for cancellation the certificate which he held representing all the outstanding stock of the company, which was cancelled. Westcott Oil Company was finally dissolved by court decree on June 19, 1953.

XXVII.

During all of the period that the Westcott Oil Company was being liquidated and its business affairs wound up, Mattison was neither a statutory officer nor a director of the company. Mattison did not direct or control the liquidation and dissolution of the company.

XXVIII.

Subsequent to the time the company was dissolved and on November 3, 1953, Mattison received shares of stock in the Lilly Seed Company which he sold in 1955 for $1,000.00 and an insurance refund in the amount of $275.90. The $101,585.76 distributed to Mattison on May 12, 1953, the insurance refund, and the fair market value of the Lilly stock, were reported by the plaintiffs as long-term capital gain in 1953.

XXIX.

The 2,164 shares of stock of the Westcott Oil Company purchased by Mattison in May, 1952, cost him $1,347,480.57. The 25 shares of stock he acquired in 1945 cost $4,841.25. His total cost of all the stock was $1,352,321.82. The physical assets of the company distributed to him by way of partial distribution in June, 1952, were sold for $1,689,399.07 which is accepted without dispute as their fair market value. In connection with the distribution to Mattison of the operating assets, he personally assumed an obligation of the company in the amount of $310,-123.89 to the First Security Bank. Thus, Mattison realized in 1952, after expenses totaling $3,677.07, a gain of $23,276.29 over the cost basis of his shares. This gain was reported by Mattison and his wife on the joint return they filed for the year 1952. The portion of this gain attributable to the 2,164 shares he purchased in May was reported as a short-term capital gain. The portion attributable to his original 25 shares was reported as a long-term capital gain.

XXX.

As a result of the final liquidation of the company, Mattison received a total of $102,861.66 in May and November of 1953. This amount received in 1953, Mattison and his wife reported, less expense of $38.17, on the return they filed for 1953. The entire amount of this gain they treated as long-term capital gain.

XXXI.

The Internal Revenue Service upon audit determined that the Mattisons owed additional income taxes for the year 1952 amounting to $69,257.45 and were entitled to a refund of $25,859.64 for the year 1953. As a result, the District Director of Internal Revenue assessed a net deficiency of $43,397.81 against the Mattisons, plus interest in the amount $10,064.08. This total assessment of $53,461.89 was paid by the Mattisons on July 2, 1956, to the District Director in Boise, Idaho.

XXXII.

The deficiency assessed against the Mattisons by the Internal Revenue Service is essentially due to the Commissioner's determination that $101,585.70 of the gain from the liquidation of the Westcott Oil Company which the Mattisons reported on their 1953 return as long-term capital gain, was taxable to them in 1952 as short-term capital gain.

XXXIII.

After payment of the assessment made by the District Director of Internal Revenue, the Mattisons

filed a claim for refund and after expiration of six months instituted this action.

XXXIV.

There is no dispute between the parties that $126,099.78 was the gain Mattison realized as a result of the liquidation of the Westcott Oil Company.

XXXV.

The plaintiffs contend in their claim for refund and in the complaint in this action that $23,276.29 of this gain is taxable in 1952 partly as short-term capital gain and partly as long-term capital gain, and that the $102,823.49 which they received in 1953 is taxable in that year as long-term capital gain. This is, of course, the manner in which the transaction was reported in their returns for these years.

XXXVI.

The defendant originally claimed that all but $2,273.04 of the gain realized by Mattison is taxable in 1952, and, except for the profit attributable to his original 25 shares, taxable as short-term capital gain.

XXXVII.

At trial the defendant raised the alternate defense that the gain realized by Mattison should be allocated between the years 1952 and 1953 as reported on their returns, but taxed as short-term capital gain even though not received until 1953.

XXXVIII.

There seems no dispute that if the plaintiffs' contention as to the manner of reporting this gain is correct, then the returns are correct as filed and the Commissioner's assessment is erroneous. Nor is it disputed that if the Government's original contention be right, the assessment made by the Director is correct. If the Government's alternative defense is correct, the plaintiffs would be entitled to a substantially smaller refund, the amount of which could easily be computed.

XXXIX.

The gain here in question was realized from the purchase of all the outstanding stock of the Westcott Oil Company and the complete liquidation of that company over a period of time. The time required for the winding up and liquidation of the Westcott Oil Company was not unreasonable considering the complexities involved.

XL.

All the formalities and legal requirements incident to a purchase of stock of the Westcott Oil Company and the liquidation of that company were complied with and all the instruments involved in the transaction contemplated a purchase of stock and a corporate liquidation.

XLI.

Mattison purchased the stock of the Westcott Oil Company, not its assets. The net profit he realized was almost entirely from its complete liquidation.

XLII.

Mattison by the purchase of the outstanding stock of the Westcott Oil Company acquired not only the assets of the company but also all its sizeable liabilities including a liability of $310,000.00 to the First Security Bank of Idaho, known and unknown liabilities for taxes, and liability for all future claims of every nature which might be made against the corporation. Mattison acquired the cash funds of the company, its accounts receivable, and its accounts payable. In short, Mattison acquired every right and liability and every advantage and disadvantage which goes with the usual purchase of stock. There were no side agreements between Mattison and the selling stockholders which would distinguish the transaction between them from an ordinary purchase of stock.

XLIII.

The price at which the stock of the Westcott Oil Company was purchased by Mattison was fixed by the selling stockholders on the basis of their appraisal of the value of their shares and the tax cost to them of a sale for cash. There is no evidence that this price was based upon an appraisal or evaluation of assets, except of course to the extent the price of any stock is to some degree influenced by the value of the assets behind it. The price at which Mattison purchased the shares in question took into account the earning history of the company, its going concern value and good will, and perhaps other factors in addition to the market value of its physical assets.

XLIV.

The only unusual factor in Mattison's purchase of the stock of the Westcott Oil Company was that at the time of purchasing these shares he intended, or rather hoped, to liquidate the company at a profit. Distributing to himself and reselling the operating assets of the company was, of course, an essential part of his plan for liquidation. However, Mattison did not acquire the stock of Westcott Oil Company solely in order to acquire its operating assets. Mattison was interested in the operating assets of the company only insofar as they were part of his overall plan to liquidate the company at a profit.

XLV.

The Westcott Oil Company continued its corporate existence until June 19, 1953, when it was dissolved by court order. Until May 12, 1953, when Mattison's shares were turned into the company for cancellation, Mattison was the sole stockholder of the company and the owner of the shares in his possession.

From the foregoing Findings of Fact, the Court draws the following:

Conclusions of Law

I.

The manner of taxing the gain which Mattison received from the liquidation of the Westcott Oil Company is set forth in Section 115(c) of the Internal Revenue Code of 1939, which provides:

"Distributions in Liquidation—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock * * *"

II.

Section 115(c) being applicable to the instant liquidation, the distribution to Mattison in the net amount of $1,379,275.18 during 1952, under Section 39.115 of Regulation 118 promulgated by the Commissioner, must be first applied against the cost basis of the shares which he had acquired in the company. The amount by which the fair market value of the assets distributed to Mattison in 1952 exceeded the cost basis of his shares is taxable to plaintiffs in 1952.

III.

The distribution to Mattison during 1952 having reduced the cost basis of his shares in the company to zero, the entire net distribution made to Mattison in May and November of 1953, totaling $102,823.49 is taxable to plaintiffs in that year.

IV.

Considerably more than six months having expired between the date upon which Mattison acquired the remaining stock of the Westcott Oil Company and either the receipt of the final distribution in liquidation or the cancellation of these

shares, the gain realized by Mattison in 1953 qualifies under Section 117 of the Internal Revenue Code as a long-term capital gain.

V.

The entire gain of $102,823.49 received by plaintiffs in 1953 being taxable to them in that year as a long-term capital gain, the Commissioner's determination that the major portion of this gain is taxable to plaintiffs in 1952 as short-term capital gain is erroneous.

VI.

The assessment of taxes and interest made by the District Director of Internal Revenue, District of Idaho, against plaintiffs on June 21, 1956, totaling $53,461.89 is erroneous and the claim for the refund of this amount which was filed by plaintiffs with the District Director on July 10, 1956, should have been allowed and paid.

VII.

There is an overpayment of income taxes and interest in the amount of $53,461.89, and plaintiffs are entitled to a refund in that amount together with interest thereon as allowed by law. Plaintiffs are accordingly entitled to judgment for such amount against the United States.

Dated this 29th day of July, 1958.

/s/ FRED M. TAYLOR,
United States District Judge.

Presented by:

/s/ WILLIS E. SULLIVAN,
Attorney for Plaintiffs.

Lodged July 24, 1958.

[Endorsed]: Filed July 29, 1958.

United States District Court for the District of Idaho, Southern Division

Civil Action No. 3315

FRANK N. MATTISON and IDA G. MATTISON,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on regularly for trial without a jury before the Honorable Fred M. Taylor, a judge of the above-entitled court, on September 10, 1957; plaintiffs appearing by Willis E. Sullivan of Boise, Idaho, and Woolvin Patten of Seattle, Washington, their attorneys, and the defendant appearing by Ben Peterson, United States Attorney for the District of Idaho, and Thomas Foye, Attorney, Tax Division, Department of Justice, the parties having produced testimony and other evidence in support of their respective contentions as reflected in the pleadings filed herein, and the parties

having submitted written briefs in argument, the Court being satisfied of its jurisdiction over the parties and the subject matter of this proceeding, having considered all the evidence and briefs herein, having rendered its memorandum opinion on July 2, 1958, having heretofore signed written findings of fact and conclusions of law and being fully advised in the premises:

It is, therefore, Ordered, Adjudged and Decreed that plaintiffs have and recover judgment against the defendant in the sum of $53,461.89, plus interest as provided by law.

Dated this 29th day of July, 1958.

/s/ FRED M. TAYLOR,
District Judge.

Presented by:

/s/ WILLIS E. SULLIVAN,
Attorney for Plaintiffs.

Lodged July 24, 1958.

[Endorsed]: Filed July 29, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Findings of Fact and

Conclusions of Law, and Judgment, and the whole thereof, dated and filed July 29, 1958, in the above matter.

/s/ BEN PETERSON,
United States Attorney for
the District of Idaho.

[Endorsed]: Filed September 26, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY

September 10, 1957

(Judge Clark)

This cause came on for trial before the Court, sitting without a jury, Willis Sullivan and Wolvin Pattin, Esqs., appeared as counsel for the plaintiff, and Thomas H. Foye, Esq., appeared as counsel for the defendant.

After hearing counsel on defendant's motion for leave to amend answer, the motion was granted and amendment to answer filed.

After a statement of the cause by counsel G. J. Gardner, C. J. Wescott, and Frank N. Mattison, were sworn and testified as witnesses and other evidence was introduced on the part of the plaintiff, and the deposition of Frank N. Mattison was ordered published.

Further trial of the cause was continued until 10 o'clock a.m. Wednesday, September 11, 1957.

[Title of District Court and Cause.]

MINUTE ENTRY

September 11, 1957

(Judge Taylor)

This cause came on for trial before the Court, sitting without a jury, Willis Sullivan and Woolvin Patten, Esqs., appeared as counsels for the plaintiff, and Thomas H. Foye, Esq., appeared as counsel for the defendant.

Frank N. Mattison, W. F. Miller, and Joe B. Dollard, were sworn and testified as witnesses on the part of the plaintiff, and here the plaintiff rests.

Freda Costella, Charles O. Peterson, Jr., and W. D. Eberle, were sworn and testified as witnesses and other evidence was introduced on the part of the defendant, and here the defendant rests and both sides close.

Upon agreement of counsel, it was ordered that argument be submitted on brief, the opening brief to be filed within 30 days after filing of transcript, the answering brief to be filed within 30 days thereafter, and reply brief filed within 10 days.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME

Comes Now the defendant United States of America, acting through Kenneth G. Berquist, Assistant

United States Attorney for the District of Idaho, and moves the court for an order extending the time within which to file the record on appeal and docket the appeal in the United States Court of Appeals for the Ninth Circuit, up to and including December 24, 1958, on the grounds that said appeal is being prepared by the Department of Justice in Washington, D. C., and that the Department does not have sufficient time within which to designate the record and make the statement of points within 40 days from the date of the filing of the Notice of Appeal.

/s/ KENNETH G. BERQUIST,
Assistant U. S. Attorney.

Order

Good cause appearing therefor,

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is extended to November 27, 1958.

Dated this 31st day of October, 1958.

/s/ FRED M. TAYLOR,
District Judge.

[Endorsed]: Filed October 31, 1958.

In the District Court of the United States in and for the District of Idaho, Southern Division

No. 3315

FRANK N. MATTISON, Et Ux.,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Honorable Fred M. Taylor, Judge

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

For the Plaintiff:
WOOLVIN PATTEN, ESQ.

For the Defendant:
THOMAS FOYE,
Tax Division,
United States Department of Justice,
Washington, D. C.

September 10, 1957, 10:30 o'Clock A.M.

The Clerk: Frank N. Mattison, et ux., vs. The United States of America, Number 3315.

Mr. Ben Peterson: May it please the Court, I would like to move the admission of Mr. Thomas Foye. He is previously vouched for.

The Court: The motion will be granted, he is admitted.

Mr. Peterson: Thank you, your Honor.

(Mr. Foye was sworn by the Clerk.)

The Court: Since yesterday, gentlemen, I have considered this motion to amend the defendant's answer. I am going to grant the motion. I do not think that it makes a great deal of difference to the issue. Should the plaintiff find that it might be prejudicial in any way and he might need more time the time will be granted.

Mr. Woolvin Patten: In that connection, your Honor, I am preparing a reply. May I have permission to file my reply a little later?

The Court: Yes, you may. I doubt that it is a counterclaim, Mr. Patten. Are you ready to proceed, gentlemen?

Mr. Patten: Plaintiff is ready, your Honor.

Mr. Thomas Foye: The defendant is ready, your Honor. [5*]

Mr. Patten: Your Honor, the plaintiff's opening statement will be very brief here. We have been over this a number of times before. In essence, the plaintiff will attempt to prove that these transactions occurred in the manner reported in the Returns, and in the manner described in the plaintiff's complaint. Our proof will consist very largely of documentary evidence; the documents of the corporation; the stock transfer books; and the legal documents which we will admit pursuant to a stipulation.

The remainder of the evidence will consist of oral testimony, corroborating the documentary evidence.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

This evidence, as you will recall, will prove that in 1951, or thereabouts, the stockholders of the Wescott Oil Company, and at that point I would like to make an observation, to avoid confusion later. The Wescott Oil Company is a corporation which was dissolved. The business formerly carried on by the Wescott Oil Company is now operated by the Wescott Oil Corporation, which is a wholly owned subsidiary of the Continental Oil Company. We may, to avoid confusion refer to the Wescott Oil Corporation as Continental. In any event, for a number of specific reasons the stockholders of the Wescott Oil Company became desirous of selling their shares. Mr. Wescott, the principal stockholder of this corporation, negotiated with several sources to find a market for these shares. [6] These negotiations broke down sometime around the winter of 1951, because the prospective purchasers did not want to pay the price that Mr. Wescott and the other stockholders wanted. At that time a Mr. Frank N. Mattison purchased the shares of Mr. Wescott and the other stockholders and proceeded to liquidate the corporation and to sell the assets, which he received as a result of such liquidation to the Continental Oil Company, or its subsidiary, Wescott Oil Corporation.

Now, frankly, at the time Mr. Mattison bought the shares from the stockholders he didn't have $1,300,000 to pay them. He used the proceeds from this sale to pay off the stock which was in the escrow at the bank, the Security Bank, here. This was a very sizeable corporation, and they proceeded to liquidate the corporation in a manner which was expedient

with the size of the corporation and the interests involved.

During the year 1952 Mr. Mattison received, as a result of this liquidation $1,689,399.07; he paid corporate obligations of $310,123.89; realizing a net amount of $1,379,275.18; that the cost of shares to him was $1,352,321.82; that after allowing expenses incurred in connection with this transfer of $3,677.07; he realized a profit in 1952 of $23,276.29 which he properly accounted for in his return for that year, partially as a long term capital gains and [7] partially as a short term capital gain.

When it was certain that all the debts of the corporation had been paid and that all claims had been received the corporation was dissolved. As a result Mr. Mattison received $101,585.76 in cash. He received some shares of the Lily Seed Company with a market value of $1,000; and somewhat later he received an insurance refund due the corporation of $275.90; that he reported the entire $102,861.66 in his return for the year 1953 as a long term capital gain.

Thereafter the Commissioner assessed against Mr. Mattison a tax of $69,257.45 for the calendar year of 1952, plus interest in the amount of $13,584.89 and allowed him a credit against this assessment of $29,382.45, said credit being based on the determination by the Commissioner that Mr. Mattison had overpaid the 1953 tax.

Mr. Mattison has filed a proper claim for refund and now institutes this suit for a refund.

I would like at this point to file a stipulation

which has been agreed to between the attorney for the plaintiff and the defendant.

The Court: It may be filed. Do you care to have this stipulation appear in the record, Mr. Patten, in the Reporter's Record?

Mr. Patten: I think that just being filed would be [8] satisfactory, your Honor.

The Court: Very well.

Mr. Patten: It might be of some help to the Court for me to list them. Exhibit A, under the stipulation, are the Returns of Frank N. and Ida G. Mattison for the calendar year 1952.

The Clerk: We generally mark by number.

Mr. Patten: Plaintiff's Exhibit No. 1.

Mr. Foye: May it please the Court, I wonder if for the purpose of convenience we might have the exhibits marked as they are designated on the stipulation?

The Court: They are referred to by letters in the stipulation?

Mr. Foye: Yes, your Honor.

The Court: They may be filed as Exhibits A, B, etc.

Mr. Patten: Exhibit B, under the stipulation is the Individual Income Tax Return of Frank N. and Ida G. Mattison for the calendar year 1953.

Exhibit C, under the stipulation, is a Corporation Income Tax Return for the Wescott Oil Company for the calendar year 1952.

Exhibit D of the stipulation, is the corporation Income Tax Return of the Wescott Oil Company for the calendar year 1953.

Exhibit E of the stipulation is a certified and [9]

attested copy of the corporation records, corporation petition for incorporation and the certificate of the Allen Oil Company, and the amendment changing the name to the Wescott-Allen Oil Company, and a final amendment changing its name to the Wescott Oil Company.

Exhibit F is a certified and authenticated copies of the judgment and decree of the District Court of the Third Judicial District, State of Idaho, in and for this County, dissolving the Wescott Oil Company; a certified copy of the notice which was published in the local press; a copy of the notice and a copy of the petition for dissolution.

Exhibit G is an Offer and Purchase Agreement, dated May 12, 1952, executed between the Continental Oil Company and Frank N. Mattison.

Exhibit H is a collection of 17 Option Agreements, executed by the same number of stockholders of the Wescott Oil Company in favor of Frank N. Mattison, dated, generally, from May 22, to the last of May.

Exhibit I are letters from Frank N. Mattison to the same stockholders giving them notice of his election to exercise the options which had been granted.

Exhibit J is the Minute Books of the Wescott Oil Company. I might mention that these are not complete Minute Books, they only cover the portion which is here in [10] question.

Exhibit K is a large group of Assignments, Deeds, and other legal documents conveying a great deal of personal and real property from the Wescott Oil Company to Mr. Frank N. Mattison, dated June 16,

1952. I can offer the Court no assurance that they are absolutely complete but the remainder would be substantially identical with these.

Exhibit L is a similar list of legal documents, conveying these same assets from Mr. Frank N. Mattison to the Wescott Oil Corporation.

Exhibit M is the Stock Transfer Book of the Wescott Oil Company.

Exhibit N is three checks of the Wescott Oil Company, dated March 12, 1953, and May 12, 1953.

Exhibit O is the Cash Book of the Wescott Oil Company for the year 1952 and 1953.

Exhibit P is a deposit slip showing the deposit of $289,399.07 to the bank account of Frank N. Mattison on June 27, 1952, and a voucher further describing the deposit.

Exhibit Q is the deposit slip showing the deposit on May 13, 1955, of $1,000 to the bank account of Frank N. Mattison.

The Court: Under the stipulation Exhibits A to Q, inclusive, will be admitted. [11]

(The documents referred to were marked Plaintiff's Exhibits A to Q and were received in evidence.)

Mr. Patten: By informal agreement between counsel, I would like to offer in evidence a Notice of Assessment, issued by the Internal Revenue Service on June 22, 1956, against Frank N. and Ida G. Mattison.

The Court: It may be marked as Exhibit R, if there are no objections. Are there any objections?

Mr. Foye: No objection, your Honor.

The Court: Exhibit R may be admitted.

(The document referred to was marked Plaintiff's Exhibit R and was received in evidence.)

Mr. Patten: I would like to offer a notice received from the Internal Revenue Service, on the same date, further explaining the credit which was allowed on Exhibit R.

Mr. Foye: No objection to that, your Honor.

The Court: Exhibit S may be admitted. What is that, Mr. Patten?

Mr. Patten: Notice of Adjustment, sir.

(The document referred to was marked Plaintiff's Exhibit S and was received in evidence.)

Mr. Patten: I would further like to offer a Statutory Notice, dated February 10, 1956, received by Frank N. and Ida G. Mattison for the Internal Revenue [12] Service, commonly known as a Ninety-Day Letter.

Mr. Foye: May I see that, Mr. Patten?

Mr. Patten: Certainly.

Mr. Foye: No objection, your Honor.

The Court: Exhibit T may be admitted.

(The document referred to was marked Plaintiff's Exhibit T and was received in evidence.)

Mr. Patten: I would like to offer a letter, dated February 6, 1955, commonly known as a Thirty-Day Letter, received by Frank N. and Ida G. Mattison

from the Internal Revenue Service. I would like to stipulate that there are certain pencil notations which appear on this that were placed there by Mr. Mattison later.

Mr. Foye: No objection.

The Court: Exhibit U may be admitted.

(The document referred to was marked Plaintiff's Exhibit U and was received in evidence.)

Mr. Patten: I would like to also offer—by way of explanation I just located this document—an Assignment, dated June 10, 1952, whereby the Continental Oil Company assigned the Option Agreement, which has been admitted as Exhibit D, to the Wescott Oil Corporation.

Mr. Foye: I have no objection. Do you have a copy of it? Could we stipulate that the document may later be withdrawn for photostating, your Honor? [13]

Mr. Patten: Yes.

The Court: Yes. Being no objection, exhibit V may be admitted.

(The document referred to was marked Plaintiff's Exhibit V and was received in evidence.)

Mr. Patten: I would like to call Mr. Gardner to the stand.

Mr. Foye: May I have an opportunity to make an opening statement, Mr. Patten?

Mr. Patten: Yes, sir. Pardon me.

Mr. Foye: May it please the Court. I do think it will be necessary to go into the facts of this transaction in detail. I might state that I am in substantial agreement with the facts as Mr. Patten stated them. There are some things which he did not cover, for instance; the fact that Mr. Wescott had substantial negotiations with Continental Oil Company in 1951 and 1952, some of which the evidence will show that Mr. Mattison was a participant in. The only other note I have is that since this transaction was carried out by, and is the matter of the peculiar knowledge for the plaintiff and the other witnesses in this case will be called on behalf of the plaintiff, the Government's case will be made through cross-examination of the witnesses.

Mr. Patten: I want to state that I agree with the [14] facts that Mr. Foye has added to my opening statement.

G. J. GARDNER

a witness called on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: G. J. Gardner.

Direct Examination

By Mr. Patten:

Q. Where do you live, Mr. Gardner?

A. In Boise, Idaho.

Q. And what is your occupation, sir?

(Testimony of G. J. Gardner.)

A. I am Vice-President and Trust Officer of the First Security Bank of Idaho.

Q. And in such a capacity do you have custody of records in the bank? A. I do.

Q. You have received a subpoena issued by the plaintiff in this action? A. Yes, sir, I have.

Q. We have asked you to bring certain records?

A. Yes.

Q. You have those records? A. I have.

Q. Are those records kept in the ordinary [15] course of business by the bank? A. Yes.

Mr. Patten: May I approach the witness, your Honor?

The Court: Yes, you may.

Mr. Patten: Your Honor, we would like a stipulation that the originals of these may be withdrawn and photostatic copies substituted.

The Court: Very well. There is no objection.

Q. (By Mr. Patten): Do these records relate to an Escrow Agreement between Frank N. Mattison and certain stockholders of the Wescott Oil Company?

The Witness: Yes.

Mr. Patten: I ask that these documents be marked for identification, please.

The Clerk: Plaintiff's Exhibit W.

(The document referred to was marked Plaintiff's Exhibit W for identification.)

Mr. Patten: I ask that this card be marked Plaintiff's Exhibit, next in order.

(Testimony of G. J. Gardner.)

The Clerk: Plaintiff's Exhibit X.

(The document referred to was marked Plaintiff's Exhibit X for identification.)

Mr. Patten: Also, this one. [16]

The Clerk: Plaintiff's Exhibit Y.

(The document referred to was marked Plaintiff's Exhibit Y for identification.)

Q. (By Mr. Patten): Referring to the document which has been marked for identification as Plaintiff's Exhibit W, I wonder if you will explain what that document is?

The Witness: This is a record made up on the stock that was received from various individuals, the number of shares, the amount they were to receive less the tax, and the net amount distributed to them.

Q. Let us go across. The first column, what does that show? A. The number of shares.

Q. And the next column, what does it show?

A. The amount per share they were to receive.

Q. No, it appears to be the name of the individual. A. I was—yes.

Q. To Whom Issued.

A. The second column is the party who owned the stock, what name the stock was issued in.

Q. And the next?

A. The number of shares of stock that was owned.

Q. And the next column?

(Testimony of G. J. Gardner.)

A. Is the amount per share they were to receive. [17]

Q. And the next column?

A. The total amount they were to receive for the number of shares deposited.

Q. And the next column?

A. The tax that was deducted from the individual.

Q. And the last column?

A. The net amount they received after the deduction of taxes.

Q. In other words, the last column is the net amount which was paid to the stockholder?

A. That is correct.

The Court: Just a moment. When you speak of tax, Mr. Gardner, that is the Transfer Tax?

The Witness: Yes, sir.

Q. (By Mr. Patten): And the last column, sir?

A. The last column is bank information only as to where the money was distributed.

Q. In other words, certain of the shares are deposited as collateral? A. That is correct.

Mr. Patten: I offer Exhibit W in evidence.

Mr. Foye: Your Honor, since we do not have copies, I wonder if I may go over it as Mr. Patten goes over it, to save time. I have no objection to Exhibit W, this top [18] sheet.

The Court: It may be admitted.

Mr. Patten: May I withhold the offer and ask about the second sheet?

The Court: Very well.

(Testimony of G. J. Gardner.)

Q. (By Mr. Patten): There is a second sheet attached to Exhibit W, will you tell us what that is, sir?

The Witness: That is a record of the actual payments—the net payment that was made for the benefit of each individual stockholder.

Q. Now, how was that amount paid, sir?

A. Cashier's checks were issued by the bank directly to them, or to the bank for their account if they happened to owe it to the bank.

Mr. Patten: Now, I would like to reoffer Exhibit W.

Mr. Foye: That is both sheets, Mr. Patten?

Mr. Patten: Yes.

Mr. Foye: No objection.

The Court: Exhibit W may be admitted.

(The document referred to was marked Plaintiff's Exhibit W and was received in evidence.)

Q. (By Mr. Patten): I am handing you a document which has been marked for purposes of identification as Plaintiff's [19] Exhibit X, can you tell us what that is?

The Witness: This is a card, we set up the incoming escrows, this was set up to show the amount each stockholder had coming.

Q. In other words this shows the receipt of shares from the stockholder and how much he drew for their surrender, is that correct?

A. That is correct.

(Testimony of G. J. Gardner.)

Mr. Patten: I would like to offer Exhibit X in evidence.

Mr. Foye: May I ask him a couple of questions on voire dire?

The Court: Yes, you may.

Voire Dire Examination

By Mr. Foye:

Q. Mr. Gardner, will you tell me how this document differs from the first column on Exhibit W, please?

The Witness: I think they are identical.

Q. They are the same?

A. Yes, they are the same.

Q. The first three, as a matter of fact, on Exhibit W?

A. Yes, that is correct. I forgot the arrangement there. That is correct.

Q. Would you like to see this? [20]

A. Maybe I'd better. (Examining the document in question.) Not the first three, its three, four, and five, I started here, Mr. Patten.

Q. Well, in order to get it straight, these two documents, Exhibit W and X, the number of shares, the price paid for the shares, and the amount owing to the individual stockholders are all identical?

A. That is correct.

Q. Now—that is all, thank you.

Mr. Foye: No objection to Exhibit X, your Honor.

The Court: Exhibit X may be admitted.

(Testimony of G. J. Gardner.)

(The document referred to was marked Plaintiff's Exhibit X and was received in evidence.)

Direct Examination
(Continued)

By Mr. Patten:

Q. Handing you a document which has been marked for identification as Plaintiff's Exhibit Y, can you tell us what that is?

The Witness: This is a receipt from Frank Mattison for a certificate for 2,189 shares of the common stock of the Wescott Oil Company, issued in the name of Frank Mattison.

Mr. Patten: I would like to offer Exhibit Y.

Mr. Foye: May I ask a couple of questions?

The Court: Yes, you may. [21]

Voire Dire Examination

By Mr. Foye:

Q. Mr. Gardner, is this also a request from Mr. Mattison that you surrender to him the certificates standing in his name of the 2,189 shares of the Wescott Oil Company?

The Witness: Yes, it is.

Q. And pursuant to that request you surrendered that certificate to him, did you? A. We did.

Q. On June 16, 1952? A. Yes.

Mr. Foye: Thank you. No objection, your Honor.

The Court: Exhibit Y may be admitted.

(Testimony of G. J. Gardner.)

(The document referred to was marked Plaintiff's Exhibit Y and was received in evidence.)

Direct Examination
(Continued)

By Mr. Patten:

Q. Now, Mr. Gardner, do you know how the—you say that certified checks were issued to the stockholders in the amount of $1,135,000, is that correct, sir?

The Witness: That is correct.

Q. And certain stock transfer taxes and incidental expenses were paid?

A. That is correct. The Stock Transfer Tax was paid. [22]

Q. Do you know where the bank received the funds to make the payment?

A. No, I don't. It came in by check from someone from someplace, but I don't remember.

Q. Do you know the amount of the check that came in, sir?

A. I can't tell you that positive. I believe $1,135,000. I'm not positive on that figure.

Q. Do you know whether a payment was made to the Note Department in a very substantial amount on the same day? A. Yes, there was.

Q. Do you know the amount of that payment?

A. If I recall correctly, it was $265,000.

Q. You have made a search for that check, have you not, sir? A. We certainly have.

Mr. Patten: You may inquire.

(Testimony of G. J. Gardner.)

Cross-Examination

By Mr. Foye:

Q. Mr. Gardner, Exhibit X, which you stated was what again please, sir?

A. The record of the number of stock certificates received from each individual and the amount due for each share and the total amount they were to receive. [23]

Q. And Exhibit W, again, please?

A. That is a record of the owner of the stock and number of shares he owned, and the amount he was to receive, and the total amount he was to receive for those shares, less the Transfer Tax, and the net amount that he received.

Q. Can you tell me from an examination of these documents, Mr. Gardner, whether all of the stockholders of the Wescott Oil Company were to receive the same price for their shares?

A. (Examining the document): No, they were not.

Q. How was it to differ?

A. Mr. Wescott was to receive a different amount for his certificates.

Q. For all of his stock?

A. For all of his—let's see here.

Q. I think Mr. Westcott has some certificates here.

A. They are for Trustee, for 607 shares of his stock he received a different figure.

Q. Can you tell from the document whether that

(Testimony of G. J. Gardner.)

is all of the stock he owned outright in his own name?

A. No, our records show he owned additional stock.

Q. And he was to receive what price for that stock, sir?

A. The same as the others, 607-63.

Q. Thank you, sir. Now, do you know, sir, what [24] the purpose of surrendering to Mr. Mattison the one certificate of stock referred to in Exhibit Y was?

A. I can't rightly tell you what the purpose of that was. We—I knew nothing about the transaction except to follow our escrow instructions.

Q. You didn't know then what the purpose of surrendering that to him was?

A. No, I can't say that I did.

Q. As far as you know, Mr. Gardner, did your bank follow out the terms of the escrow instructions as they were spelled out in the escrow instruction?

A. As far as I know, we did. I didn't hear any complaint.

Q. Mr. Gardner, do you have an idea at all, when payment was received by your bank for the stock that was in escrow there?

A. Will you repeat the question?

(The last question was read by the Reporter.)

A. The records indicate it was June 16.

Q. Your records indicate that you received payment on June 16, sir? A. 1952.

(Testimony of G. J. Gardner.)

Q. You have no records showing the manner or from whom it was received?

A. I could not find it, sir. [25]

Q. Do you have a personal recollection of the fact, Mr. Gardner? A. No, I don't.

Q. You don't recall who paid that money to you, or how it was paid to you?

A. I'd like to make one word of explanation. This escrow was actually handled through an Escrow Teller that we have and I did not do the actual detail of it.

Q. What was his name? A. Mr. Morris.

Q. M-o-r-r-i-s? A. That is right.

Q. Would he be the individual who received the payment that was to be distributed to the various stockholders, sir.

A. He would have received it.

Q. Is he still employed by your bank?

A. Yes, he is.

Q. I am not sure if this is in the record or not, do your records show the date you distributed this money to the stockholders?

A. Yes, it shows it was distributed on June 17, 1952.

Q. Does that show in any of the records that are in evidence, Mr. Gardner?

A. Yes, it does, on the yellow card, it shows on [26] the back, "Paid, June 17, 1952."

Q. And that refers to the distributions to the various stockholders? A. Yes, sir.

The Court: I assume, Mr. Gardner, when you

(Testimony of G. J. Gardner.)

refer to the 16th and 17th of June you are talking about 1952? A. 1952, yes, sir.

Q. (By Mr. Foye): I think you stated on direct examination, sir, that your recollection was that your bank had received about $1,135,000 to distribute to the stockholders, is that right?

A. That is right. That's what shows went through our Escrow Department.

Q. Is that shown as disbursements or receipts in your Escrow Department?

A. It shows as disbursements.

Q. You have no record of receipts?

A. I have not.

Q. Would it always be necessarily true that the disbursements were equal to the receipts in this situation?

A. They wouldn't have to, they could be different.

Mr. Foye: I have no further questions. [27]

Redirect Examination

By Mr. Patten:

Q. Do you recall whether the bank retained the original shares which they received from the stockholders in exactly that form during the entire period of escrow?

A. I—I don't know. I—I really can't tell you. I think we did during the period of the escrow, I don't know on that, I can't tell you.

Q. You don't know.

Mr. Patten: That is all.

(Testimony of G. J. Gardner.)

Recross-Examination

By Mr. Foye:

Q. You have no records, Mr. Gardner, showing when you distributed the various certificates of stock, or what you did with them?

A. I didn't locate those records.

Q. Did you look for them?

A. I did not look for them, no, sir. I didn't know they would be required. I didn't make any search for them.

Q. Do you know whether or not the bank has such records?

A. I don't know whether we can locate them or not.

Mr. Patten: I will offer to stipulate that [28] these original shares were, on or about June 10, surrendered to Mr. Mattison and that a new certificate evidencing ownership of 2,189 shares was issued in the name of Frank Mattison and was substituted in the Escrow Department.

Mr. Foye: You say those original shares were surrendered to Mr. Mattison?

Mr. Patten: Yes, and surrendered to the corporation and a new certificate was issued on June 10, a single certificate of 2,189 shares was issued by the Escrow Department.

Mr. Foye: And these individual shares were surrendered to the corporation sometime about June 10?

Mr. Patten: Yes.

Mr. Foye: Thank you. That will be fine.

The Court: Do you have the stipulation, Mr. Reporter?

The Reporter: Yes, sir, I have.

The Court: Very well, it is so stipulated. Before you proceed we will take our morning recess.

(The witness left the stand.)

(A short recess was taken.)

The Court: You may call your next witness.

Mr. Patten: Mr. Gardner was going to have Mr. Morris come over. Would it be satisfactory to interrupt to put him on? [29]

The Court: Yes, you may.

Mr. Patten: If it would help the Government, I would be willing to stipulate, although neither one of us can prove it by the bank at this point, that on or about June 16, the bank received a check in the amount of $1,400,000 from the Continental Oil Company.

Mr. Foye: I will agree.

Mr. Patten: That $256,000 and some odd cents of this amount was credited to a note which was owed—that $265,000 was credited to a note which was owed by the Wescott Oil Company.

Mr. Foye: To the bank.

Mr. Patten: To the bank. And the remainder of approximately $1,135,000 was turned over to the Escrow Department.

Mr. Foye: That is fine with me.

The Court: It may be so stipulated.

Mr. Patten: Mr. Wescott, please.

C. J. WESCOTT

a witness called on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name for the record, please?

The Witness: C. J. Wescott. [30]

Direct Examination

By Mr. Patten:

Q. What is your address, Mr. Wescott?

A. I believe you'd better get closer, Mr. Patten, I can't hear very well.

Q. What is your address, sir?

A. My address?

Q. Yes, sir. A. 819 North 17th, Boise.

Q. And what is your present occupation?

A. I am President of the Wescott Oil Corporation.

Q. Do you know who owns the Wescott Oil Corporation?

A. The Continental Oil Company, wholly.

Q. It is a wholly owned subsidiary?

A. Yes, wholly owned.

Q. Now, how long have you been in the oil business, Mr. Wescott?

A. Well, that will be a surmise. I would say 40 years.

Q. Now, Mr. Wescott, do you have a nickname?

A. "Ike," is my nickname.

Q. Are you familiar with a corporation known

(Testimony of C. J. Wescott.)

as the Wescott Oil Company? A. Yes.

Q. That is an entirely separate company from the [31] Wescott Oil Corporation?

A. That is true.

Q. When did you become connected with the Wescott Oil Company?

A. In 1926. However, it was known then as the Wescott-Allen Oil Company.

Q. And in 1926, what was your connection with the Wescott Oil Company?

A. I was the President.

Q. Did you own any stock in it?

A. About 20 per cent.

Q. And who owned the other 80 per cent?

A. The Continental Oil Company.

Q. Now, how long were you President of the Wescott Oil Company? A. Until 1952.

Q. Would that possibly be 1953?

A. It could be—it would be. I'm not certain on those dates.

Mr. Foye: I will stipulate it was 1953.

The Witness: I would be President up until the dissolution.

Mr. Patten: Yes, sir.

The Witness: Right. [32]

Q. (By Mr. Patten): At any time after 1926, was there a change in the ownership and control of the Wescott Oil Company? A. Yes, in 1945.

Q. What was that change, sir?

A. I bought out the entire stock of the Continental Oil Company.

(Testimony of C. J. Wescott.)

Q. And became the sole stockholder of the Wescott Oil Company? A. Yes.

Q. Now, did you sell any of these shares?

A. Yes.

Q. And to whom did you sell them?

A. I don't know if I can name them all now. I sold them to Jack Simplot, to Lynn Driscoll, to—some to my sister, some to John Eckstein—haven't you a list off stockholders there?

A. Yes, the list is in the record. At what price did you purchase these shares from the Continental Oil Company? A. I believe $193.65.

Q. And at what price did you sell them for to the other stockholders? A. At the same price.

Q. Do you know why the shares of stock [33] became available in 1945?

A. Well, in 1945 the Continental Oil Company sold all of their holdings to the General Petroleum Company. I might tell you that all of the holdings, except ours, they sold all of the holdings in their own company.

Q. Yes, sir.

A. And then they came to me and wanted to know if I wanted to buy their portion. In other words they were withdrawing from the territory west of Twin Falls.

Q. And why were they withdrawing from the territory west of Twin Falls?

A. Well, they told me their reason was they didn't have their own product here and were not competitive.

(Testimony of C. J. Wescott.)

Q. Now, during its years of operations, has the Wescott Oil Company been a profitable operation?

A. Yes.

Q. Would you say very profitable? A. Yes.

Q. At any time since 1945, have you or the other stockholders been interested in selling your shares?

A. Yes.

Q. Why were you interested in selling these shares—first, when did you become interested in selling your shares?

A. Well, I became interested after I had a stroke.

Q. Yes, sir. [34] A. I was a sick man.

Q. And——

A. My estate was in poor shape.

Q. When did you have your illness, sir?

A. I cannot point that. It was after we bought the stock and the illness progressed and we had no opportunity at that time to sell that stock that I knew of.

Q. Now, did you know if the other stockholders were interested in selling?

A. Yes, I know they were.

Q. And why were they interested in selling?

A. They were probably interested in my health. I was probably the key man there. At one time one of the stockholders asked me if I couldn't sell it. He said, "You can sell to more advantage than any one of us."

Q. Was there any reason besides your health

(Testimony of C. J. Wescott.)

that you, or the other stockholders, might have been interested in selling your shares?

A. You mean besides my health?

Q. Yes, besides your health.

A. Well, I know one or two that had large obligations and that they wanted to dispose of it for that reason.

Q. Were there any other business reasons why the stockholders and yourself were interested in selling your shares? [35]

A. I can't think of it—unless its profit.

Q. Were there any reasons or competition about that time?

A. Well, the competition arose in '51, yes.

Q. Yes. A. Yes.

Q. Did that have any effect on your desires to sell your shares?

A. Well, yes. In order to compete we had to borrow at least a millon dollars. We didn't have that kind of credit.

Q. Why did you need a million dollars?

A. To compete with the companies coming in. We knew their program, they were coming in with a pipeline and we knew they were going to dot the state with new service stations—up-to-date service stations—ours were not, and we would have to rehabilitate practically our whole company.

Q. Now, when did your desires to sell your shares crystalize to the point that you started doing something about it? A. In '51.

(Testimony of C. J. Wescott.)

Q. And what efforts, if any, did you make toward selling your shares, sir?

A. Let me describe it in my own way. [36]

Q. Yes, sir.

A. Sometime in '51, the Continental Oil representative called at my office.

Q. Who was that?

A. Mr. Lentz, L-e-n-t-z, Joe Lentz, and wanted to know if we were interested in disposing of our stock and I told him, "Yes." And he said, "We are interested in buying." And he told me why, that they were coming in here with their own products and reentering the territory again, and that they had to have so much gallons for the building of the pipeline from Parco to Salt Lake. And he wanted to know what we wanted for the stock, and I said, "I'll see you in the afternoon." And I talked to one or two—maybe three—of the larger stockholders and when he came back I told him I thought we would be willing to sell on this basis of $500 a share in a trade for Continental stock. These negotiations were more or less simmering around and died down.

Q. How many shares, at that time, of Continental would you have gotten on the basis?

A. Well, I didn't figure it myself but I understand it was about ten-to-one. We would have traded our shares at $500 for their average market shares. What that figured out, I don't know, but I understand it was about ten-to-one.

Q. And were those negotiations successful? [37]

A. No.

(Testimony of C. J. Wescott.)

Q. What happened?

A. Well, they held it in abeyance for some reason. I don't know what happened.

Q. What did they tell you?

A. Well, they were always—they didn't want me off the hook exactly, but they were still negotiating on something, pipelines, or something.

Q. And do you recall the precise reason those negotiations broke down?

A. Well, they did not completely break down, not until—they broke down in '52, I believe.

Q. Do you recall about what time they broke down?

A. No. I don't understand your question.

Q. About what time did you——

A. Well, I'll tell you something——

Q. ——decide——

A. Allow me to finish the story. In the meantime I went to the Phillips Oil Company and tried to dispose of the stock and I made them a price, I don't recall what the price was. I believe the Phillips people would have the record.

Q. I see.

A. I am certain it was under the price that I finally received. [38]

Q. Yes, sir.

A. And their answer was that they thought I wanted too much. In other words, they weren't interested.

Q. Who did you deal with at the Phillips Petroleum Company?

(Testimony of C. J. Wescott.)

A. Mr. Jim Moyle, and he took it up with Ted Lyon at Bartlesville, who, I believe at present is in charge of marketing for the Phillips people.

Q. Did you contact any other oil companies?

A. Yes, sir.

Q. Who else, sir?

A. I contacted the Sinclair Oil, and I—let me get this straight—that's been so long ago—but they were operating, they were purchasing property, they were also interested because they were pioneers in these lines, but they used a broker. Now, that broker's name—it slipped my memory, but I went to see him in response to a letter from him.

Q. Where did the broker live?

A. Salt Lake. He had already purchased property for them. The day I arrived I asked if his people were in a position to do business with me, and he thought they were. The next day he told me they were not interested.

Q. Now, you said that you were discussing with Continental an exchange of your stock—of Wescott Oil stock [39] for Continental stock.

A. That is true.

Q. Why were those negotiations not concluded?

A. For the reason that their stock—we were not willing in other words to trade our stock at $500 for their stock which had appreciated considerably in the meantime.

Q. In other words you didn't——

A. The basis of the change is where we broke down.

(Testimony of C. J. Wescott.)

Q. Instead of ten shares for one, they wanted to give you seven shares for one?

A. I don't recall the ratio.

Q. Was that the reason the negotiations broke down? A. Yes, on the exchange.

Q. Did you ever discuss with the Continental Oil Company a sale of your shares for a cash price?

A. Yes.

Q. What kind of a cash price did you quote them?

A. Well, that was—well—that was at the same time that our negotiations broke down in the exchange of stock, as I recall it, and then they talked about purchasing the stock.

Q. For a cash price?

A. For a cash price.

Q. And what cash price did you agree on? [40]

A. The cash price was to be approximately $500 net. They were to pay enough more to take care of the taxes.

Q. And about what price did that figure out at?

A. Six-hundred-seven, or it might have been six-hundred-one, or six-hundred-six, I don't know.

Q. In other words you wanted $500 plus that amount of tax you would have to pay if you sold them?

A. That is true, to make it hold.

Q. Were they willing to pay that amount?

A. No, they turned that down.

Q. Now, do you recall when Continental turned down your demand for this price?

(Testimony of C. J. Wescott.)

A. I made a deposition the other day and after I made the deposition I find my memory is pretty poor on dates and I am mixed up about two or three months—that was six years ago.

Q. Now, can you come any closer to the date?

A. Yes, I think it was March—or in there someplace?

Q. Yes, early in 1952, is that it?

A. That's correct.

Q. Now, in these negotiations with the Continental Oil Company, and the Phillips Petroleum, and the broker in Denver, did you ever discuss the sale of assets of the Wescott Oil Company? [41]

A. No, we never reached that.

Q. Why didn't you discuss the sale of assets?

A. With those people?

Q. Yes.

A. I wouldn't have any way—but they were disinterested.

Q. As a matter of fact, did you ever discuss with anyone the sale of assets?

A. No, you mean the company sale of assets?

Q. Yes, sir. The sale of assets by the company.

A. No, no.

Q. And why didn't the company want to sell the assets? A. Well, a tax angle.

Q. Yes, sir. Were there any other reasons?

A. I wanted a good clean deal to start out with—and I'm a sick man and I want my money and have everything settled up.

Q. You wanted $500 per share in your hands?

(Testimony of C. J. Wescott.)

A. That is correct.

Q. During any of these negotiations with Continental Oil Company, was Mr. Mattison present?

A. Yes, yes.

Q. And who is Mr. Frank N. Mattison?

A. At that time he was Secretary of the [42] Wescott Oil Company.

Q. And how long has he been with the Wescott Oil Company?

A. Since 1923. He was there before I was. I have known him since 1926.

Q. Did—and for what purpose did Mr. Mattison attend some of these meetings? Did he attend all of these meetings where you were negotiating?

A. No.

Q. Do you recall any of them?

A. The ones he attended was when I thought the business was starting to jell and I wanted him there to check their figures. He had been furnishing me all of the figures all of the time.

Q. You got mainly profit and loss and balance sheets, did you not? A. Oh, yes.

Q. Now, when was the first time that Mr. Mattison approached you with an idea of buying your stock?

A. Well, it was after our negotiations had broken down on the sale of the stock. I can't give you the exact date, but it happened in Boise, and I think the way he put it was this way: "Why can't I buy this and liquidate it?"

Q. What price did you quote to Mr. Mattison?

(Testimony of C. J. Wescott.)

A. I quoted him the same price I quoted Continental. [43]

Q. And how did you arrive at that price?

A. Five-hundred plus.

Q. Five-hundred plus taxes?

A. That's right.

Q. Now, did you sell all of your shares to Mr. Mattison at the same price? A. No.

Q. What shares did you get the $607 for?

A. For the shares that I had purchased in 1945. I went in on the same footing as all of the rest of them on that.

Q. Now, what price did you get for the other shares? A. I believe six-sixty.

Q. And these were in the shares you bought back in 1926? A. That's true.

Q. On what basis did you feel that you were entitled to the shares you bought in 1926?

A. It didn't cost nearly as much. It took more money to make me hold and they were worth more, they were the key stock.

Q. They were the controlling block?

A. The controlling block, that is correct.

Q. And you had to pay more taxes on these?

A. Oh, yes, considerably more. The [44] stockholders knew, there was no slip up on that, they understood that.

Q. They all knew you were going to get a higher price?

A. Oh, yes, yes, there might have been some small ones, but the majority knew.

(Testimony of C. J. Wescott.)

Q. You knew, at that time, that Mr. Mattison didn't have sufficient funds to pay for all of this stock? A. Yes, I knew that.

Q. Did you know that he intended to liquidate the company? A. Yes.

Q. Now, the negotiations which were carried on by Mr. Mattison with the ultimate purchasers of the assets, were they between Mr. Mattison and the purchasers or were those negotiations by you?

A. They were by him. You mean his deal with Continental?

Q. Yes, sir. A. He made that.

Q. Now, were you present at any of the conferences which Mr. Mattison—— A. Yes.

Q. Can you recall which one?

A. Now, I can't recall whether it was one or two.

Q. You recall you were present at at least [45] one? A. At least one, yes.

Q. Now, do you have fairly frequent contacts with the people at Continental Oil?

A. All the time.

Q. In what capacity do you have contacts?

A. In past years, yes, we were a large customer of theirs.

Q. How much oil a year did you buy from Continental?

A. That would be a wild guess. We did, in 1951—we did $3,800,000 worth of business, and I think we were purchasing, I would say half—maybe half.

Q. Now, do you hold any official position in which you have contacts with Continental Oil?

(Testimony of C. J. Wescott.)

A. Yes, I am President of the Idaho Petroleum Committee.

Mr. Foye: Will you specify what period we are talking about, please?

Q. (By Mr. Patten): How long have you been President of the Idaho Petroleum Committee?

A. I'd say ten years.

Q. Ten years. And in that capacity you have contacts with the people in the oil industry?

A. Yes.

Q. Now, when Mr. Mattison purchased the stock from [46] the other stockholders, did he go out and make the contacts and get the options, or did you do it?

A. He did. I didn't go near them.

Q. Did Mr. Mattison pay you for the shares he purchased from you? A. Did he pay it?

Q. Yes, sir. A. Yes.

Q. Do you recall the manner in which he paid you? A. Yes.

Q. What was it?

A. Well, part of it was a note, and the amount of it I can't recollect. I remember I released the stock and the balance was paid by the Escrow Agent, I believe and put in my account.

Q. Now, sir, at the time you sold your stock to Mr. Mattison, about how many filling stations did the Wescott Oil Company operate?

A. I can't give you that.

Q. Would you guess, sir?

(Testimony of C. J. Wescott.)

A. Well, it would be a guess. I think it's in the record here, somewhere, I don't know.

Q. Generally, where are your properties located?

A. All over southern Idaho and part of Oregon, in fact practically all of Idaho except the panhandle. Now, [47] when you speak of filling stations——

Q. And the bulk plants, how many bulk plants?

A. I think 20, maybe 20, or 21.

Q. Bulk plants? A. Bulk plants.

Q. Do you have any idea of how many pieces of property the corporation owned?

A. I can't give you those figures. If I could refresh my memory, if I could look at the books and tell—but they were considerable.

Q. Now, when the Wescott Oil Company went into dissolution, or rather the Resolution of Dissolution was passed, did you continue as President of the Wescott Oil Company after the dissolution started?

A. Yes—you mean—now, I don't understand your question, Mr. Patten.

Q. When——

A. I was President up to the time it did dissolve.

Q. Yes, sir.

A. Is that what you wanted to know?

Q. Yes, sir. Do you recall, in 1952, that a resolution was passed starting the process of dissolving the corporation? A. Yes, yes.

Q. During the period when the resolution was first [48] passed, until the corporation was finally dissolved, who was President?

(Testimony of C. J. Wescott.)

A. I was, up to the dissolution, the actual dissolution.

Q. And who were the directors of the corporation?

A. The same directors, with the exception of Mr. Driscoll.

Q. Mr. Driscoll had resigned? A. What?

Q. Mr. Driscoll had resigned?

A. Yes, but the rest of the directors were the same as they had been.

Q. Who would they be, sir?

A. There was myself, Mr. Driscoll, Mr. Simplot, Mr. Kramer, and my sister, I believe, and that I think is all.

Q. Now, who had control of the corporation during the period of dissolution, sir?

A. Mr. Mattison owned it.

Q. Yes, sir. Did Mr. Mattison direct you as to how this dissolution was to proceed and——

A. No.

Q. Was—did you receive any instructions or directions from Mr. Mattison as to when the dissolution should be made or when it should be withheld, or anything like that? [49]

A. I don't think I ever consulted with him on that. I consulted with my attorney.

Q. Now, why wasn't the corporation dissolved more promptly than it was?

A. Well, I thought it was dissolved pretty promptly as it was—that's a big business—a $3,800,000 business and it had been operating under

(Testimony of C. J. Wescott.)

my name since 1926, and you couldn't slam that shut very good with a bang. No one knows what's coming in. We don't know what the Internal Revenue people are going to do. We have two states, we have the gas tax, we might make a mistake in that, and since we have dissolved we have had to go out to the directors and get their signatures on the mortgage, and one thing and another.

Q. Whom did you consult with as to when you could or should dissolve the corporation?

A. I think it was Mr. Breshears.

Q. Was the dissolution of the corporation delayed for a tax benefit to Mr. Frank Mattison?

A. There was no angle in that as far as I am concerned now.

Q. Was Mr. Mattison's personal tax picture ever discussed between the directors? A. No.

Q. Was it ever discussed between you and [50] Mr. Mattison, the tax picture and how it might be affected by the dissolution of the corporation?

A. I can't recall any. What I am trying to say is that regardless of any tax angle that never would have been sold with my name on it before it was.

Q. Did Mr. Mattison ever ask you to delay dissolution that he might receive tax benefits?

A. Oh, no, no.

Q. Now, during the period of dissolution, that would be from March—from June 13, to May—from June 13, 1952, to May 13, 1953, did Mr. Mattison

(Testimony of C. J. Wescott.)

have authority to write any checks on the bank account of the corporation?

A. In the deposition I didn't think he had the right to sign a check, but I was mistaken, he could, but it had to be countersigned.

Q. Now, did any of the officers of the corporation—did any of the officers of the corporation have authority to sign a check, either singly, or by countersignature, for personal purposes?

A. Oh, no, no.

Q. For what purpose could anybody draw a check on the corporation bank account?

A. For business purposes.

Q. You have a voucher system?

A. Yes. [51]

Q. And each check has to be supported by a voucher, is that right?

A. That's right, each voucher is connected with a check. I couldn't draw any money out of there—and I was President.

Q. Now, sir, when you sold your stock to Mr. Mattison, was there any side agreement, other than evidenced by your option agreement concerning this stock? A. No.

Q. That he would give you back some of the money? A. Oh, no, no,

Q. Or that you would assume any of the obligations of the corporation? A. No, no.

Q. Was there an agreement as to what would happen if Mr. Mattison got stuck with a big tax liability? A. Never discussed.

(Testimony of C. J. Wescott.)

Q. Was there any agreement made as to what would happen if Mr. Mattison made an unusual amount of money out of this? A. No, sir.

Q. There were no pieces of paper and no agreements other than——

A. No, nothing subtle about it at all. [52]

Q. Have you received any funds from Mr. Mattison? A. Anything?

Q. Any funds, sir?

A. Any than what the record shows?

Q. Yes, sir. A. No, not a penny.

Mr. Patten: You may inquire.

The Court: Before you start the cross-examination, I notice the gentleman from the bank is here. Would you like to put him on so that he can get back?

Mr. Foye: I think in view of our stipulation, your Honor, we don't need the gentleman from the bank anymore.

Mr. Patten: May I withdraw the originals and substitute the carbon copies so that I may return these to the bank?

The Court: Is there any objection to that?

Mr. Foye: No, your Honor.

The Court: Very well.

The Clerk: W, X and Y.

Cross-Examination

By Mr. Foye:

Q. Mr. Wescott, can you hear me?

A. No, stand up here closer, boy, my ears are not good. [53]

(Testimony of C. J. Wescott.)

Q. Now, prior to 1945 Continental Oil Company was in control of Wescott Oil Company, was it not?

A. Yes.

Q. And they sold out their holdings in Wescott Oil Company because they wanted to retain their investments closer to their pipeline back east?

A. That was their story to me.

Q. Then, in 1951, they approached you to try and buy the Wescott Oil Company again, didn't they? A. That is true.

Q. Now, I think you testified that the reason they wanted to come back into the territory in 1951 was because they were going to attempt to build a pipeline out in this part of the country, is that right? A. That is their story to me.

Q. Yes, sir. Now, your meetings in 1951, you discussed the problems of exchanging the Wescott Oil Company stock for Continental Oil Company stock at a net to you of approximately $500 per share?

A. That's true.

Q. Did Mr. Mattison attend any of these meetings that you held with Continental Oil Company in 1951?

A. Yes, I don't know whether one or two.

Q. He did attend one in 1951?

A. You mean when we were talking about selling the [54] stock?

Q. When you were discussing the exchange of stock for stock, had—did he attend some of those meetings? A. Yes.

Q. He did.

(Testimony of C. J. Wescott.)

A. We had, I don't know how many meetings, one or two.

Q. He attended at least one or two?

A. Yes.

Q. Now, did you ask him to attend those meetings, Mr. Wescott? A. Yes.

Q. What purpose did you have in mind in asking him to attend these meetings?

A. He was to supply the figures, and I wanted him to check their figures.

Q. I see. This was when you were talking of the exchange of stock for stock?

A. Well, yes. The periods are pretty close together. They turned down the stock exchange. It was right after that that we started to talk about a cash proposition.

Q. But Mr. Mattison was at some of the meetings that you held when you talked about a stock exchange? A. I don't think so. [55]

Q. Oh, he was not?

A. Not on the stock—now, I'm not sure. The reason I wanted him on the cash—I wanted him to check on their figures, if the cash figures were right.

Q. You don't remember for sure whether he was at the meetings when you were talking about the exchange of stock for stock?

A. It don't run in my mind that he was. I don't know. That was a long while ago.

Q. You are not quite sure?

Q. No. I was not sure of the time of year there

(Testimony of C. J. Wescott.)

in the deposition. They are so close together, Mr. Foye, I don't know what I'd want him for on the exchange of stock.

Q. It was not necessary for you to have the financial advice about what you were getting in that exchange of stock for stock?

A. We had gone through that at Lentz meeting here before, in '51.

Q. Was that with Mr. Mattison? A. No.

Q. You did not talk to Mr. Mattison about that?

A. No, no, he wasn't around at those.

Q. Now, those negotiations of exchanging stock for stock broke down, I understand it, because Continental stock [56] went up in price?

A. Yes. They tried to hold me to the original deal. In the meantime their stock had appreciated somewhat. It would have been very unfair, I thought.

Q. Then, I think you testified, in 1952 representatives of Continental approached you again?

A. Yes, they called me up.

Q. That was early in 1952?

A. I think it was—I think March.

Q. Could it have been before March, Mr. Wescott? A. What?

Q. Could it have been before March?

A. I believe in March, the neighborhod of March. It was early in the year.

Q. I see. I suppose at that time you had several meetings with them? A. Yes.

Q. Now, when Continental approached you in

(Testimony of C. J. Wescott.)

1952, their proposition then was to purchase the stock of Wescott Oil Company for cash, is that right?

A. No, we still went through—I thought—we still went through the exchange again.

Q. Yes.

A. If you know how fellows bargain, one meeting don't settle any question. [57]

Q. Yes, sir.

A. You have to have a dozen meetings with those fellows to get those fellows to say, "Yes."

Q. After you decided, in the '51 meetings that you were not going to exchange stock for stock, they then offered to buy your stock for cash, did they not? A. No, sir.

Q. They didn't?

A. No, they'd have gotten it.

Q. Did you ever discuss it, selling your stock to them for cash?

A. Yes, and we built that figure up, and all of the time I thought that was the figure that they were going to purchase the stock.

Q. Why didn't they?

A. My proposition to them was the same to them as to Mr. Mattison, make me hold at $500, and we built this up and that is what I wanted Frank for was to check on the figures and see just what we were doing, and when we got to the point they refused the stock.

Q. Well, all the time you were talking with

(Testimony of C. J. Wescott.)

representatives of Continental about what price they would pay you for the stock?

A. That is true.

Q. Yes, and you brought Mr. Mattison in there to [58] advise you about that?

A. As to the figures, yes. If they said $1,000 I couldn't have figured the taxes. I don't know anything about tax matters to be honest with you.

Q. Mr. Mattison advised you that $607 was a good price on the stock?

A. I didn't ask his advice on the sale. I asked whether those figures were correct.

Q. Whose figures were those?

A. Continental, and I had been figuring it out in order to make hold at $500. I think we agreed at 607, I'm not positive.

Q. How did you arrive at that price, sir?

A. Well, they did most of the figuring. They told me that would do it.

Q. They figured that is what your assets were worth?

A. No, the assets had nothing to do with it.

Q. Nothing to do with it, sir?

A. No, we were not talking about assets, we were talking of making me hold at $500. We never talked about assets.

Q. Would you say it is not true that the price of the stock you are talking about had no relation to the assets of the company? [59]

A. No, I can't say that. Now, as a matter of fact, when we talked about the exchange of the stock at

(Testimony of C. J. Wescott.)

$500 into Continental, they sent a man by the name of Bob Hurd out here, and I think we spent five or six days, I did with him, showing him our property so he could get an idea, I imagine, of what is behind that stock.

Q. So the price that you were talking about with Continental——

A. Now, allow me to interrupt, Mr. Foye. At that time he was keeping a running account of what the stock was. I have never seen that yet, I would like——

Q. Who was doing that, sir?

A. Bob Hurd, of the Continental. I would like to see just what they thought it was worth. They have never seen fit to let me see that.

Q. But the price that you were talking about with them was based on the assets of the corporation, was it not?

A. No, the stock. We were selling stock.

Q. What was behind the value of the stock, Mr. Wescott?

A. Well, now, you asked the question, it's a fair one. Assets.

Q. Did the price you are talking about for the sale of the stock have any relation to the assets of the Wescott Oil Company? [60]

A. Why, certainly, it had to. They wouldn't buy the stock of an empty corporation.

Q. Sure. Would you say it was based on the assets of the company?

(Testimony of C. J. Wescott.)

A. Yes. If I was buying the stock it would be based on that.

Q. Yes, sir. Mr. Mattison didn't tell you one way or the other whether that was a good price, did he?

A. No, I didn't ask his advice on the sale. The only advice I wanted from Mr. Mattison was the accounting.

Q. And the figures that Continental were going over and you wanted Mr. Mattison to check on, they related to the value of your assets, didn't they, sir?

A. They what?

Q. They related to the value of your assets?

A. They had made an examination of our assets when we first started out, and evidently they thought $500 was a fair price.

Q. And you wanted Mr. Mattison to check to see that their inventory and valuation of your assets was——

A. No, I wanted him to check the figures to see whether, for instance, $600 or $607 is making me hold.

Q. I see. In your talks with the representatives of Continental Oil Company, did you tell them, or did you discuss with them, generally, that they should pay you [61] about $607 for your stock?

A. No, the discussion was making me hold at $500, and their accountant was doing the figuring and I thought I ought to have one to figure a little on my side.

Q. You were talking about a price that would make you hold at $500, were you not?

(Testimony of C. J. Wescott.)

A. Pardon me.

Q. I say you were talking about a price that would make you hold at $500?

A. That is true.

Q. And that price was about $607, was it not?

A. I think so, I think that was it.

Q. And that is the price you talked about with the representatives of Continental?

A. Yes, when Mr. Mattison was there, yes.

Q. Yes, and that is the price you talked about that they would pay you for the stock?

A. Yes.

Q. When did they tell you they were not going to buy stock, Mr. Wescott?

A. Well, as I recall, it was in the morning, and I was a sick man and I told them I had to get some rest. I went up to the hotel.

Q. Which hotel was that, sir?

A. The Cosmopolitan. [62]

Q. Oh, this was in Denver, was it, sir?

A. This was in Denver. And I came back at three or four and they said they didn't want to buy the stock.

Q. And that was after you had talked about the price that they were going to pay you?

A. That's right.

Q. Did they tell you why they didn't want to buy the stock? A. No, they didn't.

Q. They just told you they were not going to buy the stock? A. That's right.

Q. That is all they said? A. That's right.

(Testimony of C. J. Wescott.)

Q. After all these negotiations about the——

A. Now, wait, I ought to be exact on this—they might have said they would rather have the assets, now they might have said the—one—I don't know.

Q. Did you get the idea that they wanted to buy the assets?

A. That was—yes, sir. I couldn't help but get it.

Q. Sure. And did you get the idea that is why they didn't want to buy the stock?

A. No, I didn't get anything. I——

Q. You don't know why they didn't want to buy the [63] stock?

A. Now, here, boy, you are asking me to read their minds, and that is a pretty hard thing. I don't think they know what they are doing.

Q. Mr. Wescott, over how long a period do you think these negotiations went on that you had with them in 1952?

A. How many meetings?

Q. Over how long a period of time?

A. I think June of '51, when I negotiated with them the first time.

Q. You might have negotiated with them, not in 1952 when you started talking about their buying your stock for cash? A. Yes.

Q. How long a period of time did those meetings go on, a month or two?

A. Oh, no.

Q. Not that long? A. No, no.

Q. Two or three weeks?

A. Well, until we arrived at that point I would

(Testimony of C. J. Wescott.)

say, "Yes." They were not continuous meetings, you know.

Q. Of course not.

The Court: Mr. Foye, we will take the noon [64] recess until 2:00 o'clock this afternoon.

The Witness: It's hard for me to remember these things, Mr. Foye, I just can't do it, I can't.

(The Court recessed at 12:00 o'clock, noon.)

September 10, 1957—2:00 P.M.

The Court: You may resume the stand, Mr. Wescott.

Cross-Examination
(Continued)

By Mr. Foye:

Q. Now, Mr. Wescott, to go back just a minute, your negotiations in 1952 with the Continental Oil Company broke up because they refused to buy the stock of the Westcott Oil Company, is that right?

The Witness: That's right.

Q. And you knew then that the reason they refused to buy that stock was because they wanted someone to liquidate the corporation?

A. I'm quite certain of that.

Q. Yes, sir. They wanted just to buy the assets?

A. They what?

Q. They wanted just to buy the assets?

A. Yes, sir. That's what—I——

Q. Now, your tax attorney had advised you not

(Testimony of C. J. Wescott.)

to sell the assets of the corporation, is that right, sir? [65]

A. Well, I knew better than that anyway, without asking that question.

Q. You knew better than liquidate the corporation and sell the assets yourself?

A. No. You asked about the company selling its assets.

Q. You knew better than to sell the assets of the company? A. Yes.

Q. Did you know better than to liquidate the corporation than sell the assets? A. No.

Q. Had your tax attorney advised you not to do that? A. Yes, sir.

Q. He advised you not to do that, is that correct? A. Yes.

Q. After those negotiations blew up, you were then looking around for somebody to liquidate the corporation, were you not, sir?

A. Well, I would have been glad—no, I didn't look. I would have been glad if someone would have come and said, "I want to buy your stock," all of it.

Q. You knew it would be hard to sell the stock to anybody except a big company, didn't you, [66] sir? A. That is true

Q. Yes.

A. They are the only customers.

Q. And it was your experience that nobody was going to buy it unless they were going to liquidate it, wasn't that true? A. No, that wasn't true.

(Testimony of C. J. Wescott.)

Q. You had an opportunity to sell that stock without liquidating the corporation, sir?

A. No. You—I misunderstood your question. I thought you asked me if there was no chance of selling that stock without liquidation.

Q. Not to a big company?

A. Yes, to a big company, they had been buying their stock.

Q. You couldn't sell your stock that way?

A. Well, I found I couldn't.

Q. Yes, sir, so you were looking for someone to liquidate the company?

A. Well, I wouldn't put it that way. I would have been glad if someone came to me, which he did.

Q. Yes. You knew that he was going to liquidate the company, didn't you?

A. Oh, yes, yes indeed.

Q. Now, prior to the time you sold your stock to [67] Mr. Mattison, do you recall the time you and Mr. Mattison went to the office of Mr. Fred Costello, here in Boise?

A. I remember. I thought I was only in his office once and that was alone. I don't have a recollection of going there with him.

Q. You don't have a recollection of going there with Mr. Mattison and showing to Mr. Costello this plan? A. I never had a plan.

Q. No, sir, I didn't—let me put it this way, do you recall any time that you went to the office of Mr. Fred Costello with Mr. Mattison at which time

(Testimony of C. J. Wescott.)

Mr. Mattison presented to Mr. Costello a written plan for the carrying out of this transaction?

A. No, I don't. I may have now—that's a long while ago.

Q. You just don't recall whether you did or whether you didn't? A. How?

Q. You don't recall whether you did or whether you didn't?

A. No. I only recall being there once.

Q. Would you say you did not go with Mr. Mattison at that time?

A. No, I won't say that, I don't know.

Q. You may have? [68] A. Could be.

Q. O.K.

A. But I don't know why I would.

Q. Mr. Wescott, can you tell me, please, whether Continental paid to Mr. Mattison approximately the same price that they would have paid you, total?

A. I don't know what they would have paid me, I have no knowledge.

Q. Well——

A. I have no knowledge of that.

Q. May I finish the question? A. Yes.

Q. Do you know whether Continental paid Mr. Mattison, for the assets of the corporation, substantially the same total price they would have paid you had they bought your stock for the price for which you were negotiating?

A. They paid him more than the stock, I think.

Q. A little more than the price? A. Yes.

Q. Thank you. And you knew at the time Mr.

(Testimony of C. J. Wescott.)

Mattison came to you with the plan that he didn't have enough money——

A. He didn't come to me with his plan.

Q. ——to buy the stock? [69]

A. He didn't come to me.

Q. Oh, he didn't come to you? A. No.

Q. How did you find out about it?

A. Because he went and he made a deal with Continental.

Q. That was before he came to you?

A. No, he came to me, I didn't know what his plan was of liquidation was. He came to me and he said, "Why can't I buy this and liquidate?"

Q. Yes. You know he was going to liquidate though, didn't you? A. That's true.

Q. And you knew he was going to sell the assets to Continental?

A. Oh, yes, I knew that. I had to know that.

Q. Yes. Now, did you know whether or not he had enough money to do this on his own?

A. I knew he didn't have enough.

Q. You knew he didn't have enough?

A. That's right.

Q. Do you recall, sir, the resolution of the Board of Directors of the Wescott Oil Company of June 13, 1952, authorizing the liquidation and dissolution of the corporation? Do you recall that? [70]

A. If it's in the record, why that's me. I had to be there. I don't know, I can't recall all that.

Q. Do you recall that the directors, in 1952,

(Testimony of C. J. Wescott.)

sometime, authorized the corporation to be liquidated and dissolved?

A. Well, I'd like to see that resolution. If it is there, that's what it was.

Q. I hand you sir, Exhibit J in Evidence, here, and show you a page titled "Record of Proceedings, Minutes of Special Meeting of Board of Directors of Wescott Oil Company," and ask you, sir, if that refreshes your recollection about the resolution authorizing the liquidation and dissolution of the corporation? Mr. Wescott, I think it will be right here. (Indicating.)

A. (Examining the Exhibit): Yes, that is right.

Q. You recall that event? A. Yes.

Q. And you were a director at that time, sir?

A. Yes.

Q. Now, do you recall whether or not you would have signed that resolution in the normal course of things? A. Would I what?

Q. Do you recall whether or not you would have signed that resolution in the normal course of events? A. Yes, I think so. [71]

Q. As a director? A. Yes.

Q. Now, was it your intention, Mr. Wescott, in signing that resolution to completely liquidate and dissolve the corporation? A. Oh, yes.

Q. You didn't intend to ever carry on any other business with that corporation? A. No, sir.

Q. Do you know whether or not the other directors intended the same thing?

A. Well, you will have to ask them, they are the best evidence.

(Testimony of C. J. Wescott.)

Q. You don't know. A. No.

Q. Now, isn't it true that Mr. Mattison took you to some of the meetings that he had with Continental Oil Company? A. Yes.

Q. How many, do you recall, sir?

A. Well, the only one I can recall is one.

Q. Do you know why he took you then?

A. Yes.

Q. Why?

A. I think they wanted me there, too, because I had [72] a knowledge of the company and the assets.

Q. Now, Mr. Wescott, you helped Mr. Mattison get options on—to purchase some of the stock, did you not, sir? A. No, I didn't.

Q. You did not?

A. No, sir. Yes. Wait a minute. I had some stock that was in my name and I think I then had some that I had under my direction holding power. Yes, they asked me, naturally, I didn't go to them.

Q. You didn't go to the individual stockholders?

A. No, I'm sure I didn't.

Q. You didn't go to any of them?

A. Well, I can't recall—yes, I went to Mr. Driscoll.

Q. Mr. Driscoll? A. Yes.

Q. Did you go to any more, sir?

A. How?

Q. Did you go to any of the other stockholders?

A. Not to my recollection—I'm not sure.

Q. Are you sure you didn't go to any of them?

A. No, I'm not sure. That's six years ago.

(Testimony of C. J. Wescott.)

Q. Except Mr. Driscoll?

A. No, I'm not sure.

Q. You might have? [73]

A. I might have, I don't think I did. I might have.

Q. For what purpose did you go to Mr. Driscoll?

A. I went to Mr. Driscoll first on the $500 exchange, then I told him about this, and that was still good, I think—I'm not sure that I talked to him even about this because we had so many conversations and we were trying to get $500.

Q. Now, I am asking you, Mr. Wescott, whether or not you went to any of the individual stockholders in the Wescott Oil Company for the purpose of helping or securing an option to purchase their stock? A. I don't think I did.

Q. You don't think you did?

A. No, he went around himself and picked these up.

Q. As far as you know, did he go to all of the stockholders?

A. All of them with the exception—no, I think he went to them all.

Q. No exceptions?

A. I don't know of any exceptions. I think he went to them all. Are you asking me if I went with him on the escrow deal?

Q. No, the option to purchase the stock to which the escrow agreement was attached.

A. I don't think I did, now. I don't know. Thats [74] too long ago.

(Testimony of C. J. Wescott.)

Q. You think you might have gone to some of them, sir?

A. I won't say that. I think I didn't.

Q. You don't think you did?

A. I don't think I did.

Mr. Foye: That is all.

Redirect Examination

By Mr. Patten:

Q. Would you have sold your stock to anyone who would have paid you the price you were asking?

A. Yes, to Mr. Foye, or anybody.

Q. And how was that price arrived at, sir, the price you were asking?

A. Five-hundred dollars, net, ex taxes.

Q. And how did you arrive at the price of $500? What factors did you take into consideration?

A. Well, that was more or less pulled out of the air at the time we were trading stock. But, of course, in order to arrive at that I looked at our Balance Sheet to see just where we drifted, and our earnings statement.

Q. And your earning statement?

A. Our earnings, yes. It's pretty hard to tell the different factors that enter into determining what you want for a stock. [75]

Q. That is what you wanted, in other words?

A. That is what I wanted.

Mr. Patten: That is all, thank you.

(Testimony of C. J. Wescott.)

Recross-Examination

By Mr. Foye:

Q. You knew that your stock was only worth as much as the assets of the corporation were, Mr. Wescott?

A. It runs in my mind that the book value at that time was worth $380.

Q. And that is based on the assets, wasn't it, sir?

A. Any stock is based on assets and earning power.

Mr. Foye: That is all.

The Court: Mr. Wescott, may I ask you, wasn't there a factor of good will in the price of that stock, also, as a going company, more than just the physical assets? A. Well, I think we——

The Court: In other words, what I was asking you, Mr. Wescott, your stock was actually worth more to you than the actual physical assets?

A. Yes, Judge, that is true, but on the other hand, it was worth more to the majors than it was to me.

The Court: Yes.

Mr. Foye: Thank you, Mr. Wescott. [76]

(Witness left the stand.)

Mr. Patten: May Mr. Wescott be excused?

Mr. Foye: I have no objection.

The Court: Mr. Wescott may be excused.

Mr. Patten: Mr. Mattison, please.

FRANK N. MATTISON

called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: Frank N. Mattison.

The Clerk: Just have the witness chair.

Direct Examination

By Mr. Patten:

Q. Where do you live, Mr. Mattison?

A. 2002 North 21st Street, Boise, Idaho.

Q. Is Ida G. Mattison your wife? A. Yes.

Q. And you and your wife are the plaintiffs in this action? A. That is right.

Q. How long have you lived in Idaho, sir?

A. It will be 50 years on February 7, 1958.

Q. What is your occupation, sir?

A. I am Treasurer of the Wescott Oil Corporation. [77]

Q. And is that a subsidiary of Continental Oil Company? A. That is right.

Q. Have you ever engaged in the business of buying and selling stock? A. No, sir.

Q. Have you ever engaged in the business of buying and selling of oil properties?

A. No, sir.

Q. This proceeding involves the Wescott Oil Company, when did you first become connected with the Wescott Oil Company, sir?

A. In May, 1923.

(Testimony of Frank N. Mattison.)

Q. And what was that connection, sir, in May, 1923? A. I became Office Manager.

Q. And how long were you Office Manager of the Wescott Oil Company?

A. Until January, 1929.

Q. At the time you became associated with the Wescott Oil Company, in 1923, what was its name then? A. The Allen Oil Company.

Q. And when did its name change, sir?

A. In 1926. The name was changed to Wescott-Allen Oil Company. In 1933 it was changed to the Wescott Oil Company. [78]

Q. And when you discontinued your job as Office Manager, what position did you acquire in the Wescott Oil Company?

A. Secretary and Treasurer.

Q. And how long did you hold your position as Secretary and Treasurer of the Wescott Oil Company? A. Until early in June, 1952.

Q. And you resigned at that time?

A. That is right.

Q. How long have you known Mr. C. J. Wescott?

A. Very closely since 1926, prior by name.

Q. How long have you filed Income Tax Returns, sir?

A. My personal return was first filed in 1920.

Q. And since 1920, have you filed returns every year?

A. After 1920, at that time I was single, and

(Testimony of Frank N. Mattison.)

getting married in 1922, it was a few years that I didn't have to sign—to file.

Q. Where were all of the returns which you have filed filed, sir? A. In Boise.

Q. Now, were those returns filed on what is known as a cash or accrual basis?

A. Cash basis, always.

Q. Have you ever filed on an individual basis, on [79] any other basis than a cash basis?

A. No, sir.

Q. When did you first acquire a stock interest in the Wescott Oil Company? A. 1945.

Q. And how many shares did you acquire, sir?

A. Twenty-five.

Q. And from whom did you purchase these shares?

A. The shares were held in Trusteeship by Mr. Wescott, who originally got them for his sister, Miss Wescott, and they agreed to sell me 25 of her 77 shares.

Q. And how much did you pay for these shares, sir? A. $193.65 a share.

Q. Prior to 1945, do you know who controlled the Wescott Oil Company, or the Wescott-Allen Oil Company, or the Allen Oil Company?

A. Up until 1926 the Continental Oil Company controlled the Allen Oil Company, 100 per cent. From '26 to 1945 their control was approximately 80 per cent.

Q. And from 1945 until the final dissolution, who controlled the Wescott Oil Company?

(Testimony of Frank N. Mattison.)

A. Mr. C. J. Wescott.

Q. When did it come to your attention, sir, that Mr. Wescott and some of the other stockholders of the Wescott Oil Company were interested in selling their shares? [80]

A. When Mr. Wescott became ill, and one other stockholder was needing money pretty badly and wanted to sell his stock, approximately—at least in '51—maybe '50.

Q. Do you know of any reason that the stockholders were anxious to sell their shares at this time?

A. Due to Mr. Wescott's illness.

Q. What did Mr. Wescott's illness have to do with the value of the stock?

A. The entire Wescott Oil Company was built around Mr. Wescott.

Q. Was their any other reason, sir?

A. None that I know of.

Q. You know of no other reason why the stockholders might be interested in selling their shares?

A. Well, after Mr. Wescott became ill and when it became apparent that it would be necessary for us to borrow considerable money to rebuild and revamp the service stations and bring them up to date, I don't believe that any of them cared to put any more money in the company than what they had already put in.

Q. Do you recall when it first came to your attention that Mr. Wescott was engaged in the negotiations for the sale of the stock?

(Testimony of Frank N. Mattison.)

A. Approximately the summer of 1951.

Q. You were familiar with the negotiations for the [81] sale of the stock? A. Some of them.

Q. You heard Mr. Wescott testify, did you not?

A. Yes, sir.

Q. Did you go with him down to the Sinclair Oil Company to negotiate? A. No, sir.

Q. Did you go with him to see Phillips Oil Company? A. No, sir.

Q. Did you go with him to the broker in Denver? A. No, sir.

Q. Did you go with him to—where is the office of Continental?

A. They have one office in Denver.

Q. Did you go with him to Denver to see Continental in connection with the sale of the stock?

A. I believe one trip.

Q. One trip to Denver? A. That's right.

Q. And what did you do at this conference?

A. I simply provided Mr. Wescott with figures on the first trip that I made to Denver. The second trip was on my own that I made to Denver, that was mine.

Q. We are referring now to the trip with Mr. Wescott, what type of figures did you furnish [82] him?

A. The ordinary figures from our—Balance Sheet, Ledgers——

Q. Profit and Loss? A. That is right.

Q. At that conference did you—when you accompanied Mr. Wescott to visit with the officers

(Testimony of Frank N. Mattison.)

of the Continental Oil Company, did you or Mr. Wescott discuss with them the possible sale of assets? A. No, sir.

Q. At the time you and Mr. Wescott discussed this with Continental, did you ever discuss a sale of assets by the corporation? A. No, sir.

Q. When was the first time you discussed with Mr. Wescott your purchase of his shares?

A. I believe that would be sometime in April of '52.

Q. Now, what price—first, did you approach Mr. Wescott, or did he approach you?

A. I approached Mr. Wescott.

Q. And what price did you offer to buy these shares at?

A. A price that would net him $500 after the Federal Income Tax.

Q. Was that the same price that Mr. Wescott had demanded from Continental at the time when you were present? [83]

A. That might have been a few dollars difference.

Mr. Patten: I ask that this plain piece of paper be marked Defendant's Exhibit, next in order.

The Clerk: That is Exhibit Z.

Q. (By Mr. Patten): Handing you a plain piece of paper, Mr. Mattison—do you have a pencil—would you show us how the price of this stock was arrived at, sir?

Mr. Foye: I would like, before this goes on to have you specify which price you are talking about.

(Testimony of Frank N. Mattison.)

Q. (By Mr. Patten): The price that you and Mr. Wescott discussed, the price at which you offered to buy Mr. Wescott's shares.

The Witness: Mr. Wescott had two classes of shares.

Q. Well, let's take first the more recently acquired shares.

A. That is the same offer as the other stockholders.

Q. Yes. Would you tell us how that price was arrived at?

Mr. Foye: You are talking about the price that he paid to Mr. Wescott?

Mr. Patten; Yes, and the other stockholders.

The Witness: Figuring on the basis of the price that I had worked on, $607.63—— [84]

Q. (By Mr. Patten): How did you arrive at the price?

A. By deducting the cost of their stock, 193-65, leaving them a gross profit of $413.98, with the tax presumed that they would have to pay on the capital gain of 26 per cent, at that time, and the tax would amount to $107.63. By deducting that $107.63 from the tax, from the amount that I offered for the stock would leave a net of $500.

Q. Would it work out the same way if you took $500 and added the tax on top of it, would you make that computation also?

A. The net figure of $500, add the tax of $107.63, still makes $607.63.

(Testimony of Frank N. Mattison.)

Mr. Patten: I would like to offer Exhibit Z in evidence.

Mr. Foye: May I ask him a few questions?

The Court: Yes, you may.

Voir Dire Examination

By Mr. Foye:

Q. Mr. Mattison, this is primarily for my own enlightenment. The tax on $500 profit would not necessarily be $107.63, would it?

The Witness: There was no profit of $500.

Mr. Foye: I have no objection. [85]

The Court: Exhibit Z may be admitted.

(The document referred to was marked Plaintiff's Exhibit Z and was received in evidence.)

Direct Examination
(Continued)

By Mr. Patten:

Q. For further explanation, sir, this first figure is the sale price, is it not?

The Witness: $607.63 is the sale price.

Q. And that is the cost price of these shares, is it not, 1-9-3-6-5? A. That's right.

Q. And that is the profit, is it not?

A. That is right.

Q. And the 26 percent is using that alternate computation, is it not?

A. That is the long term computation.

(Testimony of Frank N. Mattison.)

Q. Yes, sir, and that figures out to $107.63 tax, does it? A. Right.

Q. And if we take $500 and add 1-0-7-6-3 we come out to 6-0-7-6-3, is that correct?

A. That is right.

Q. And that is the price you offered Mr. Wescott?

A. Yes, and the other stockholders.

Q. And the other stockholders. Now, had [86] you previously made a computation for Mr. Wescott's benefit along this same line, did you make that computation first at the time you first negotiated with Mr. Wescott, or did you make it for his benefit when you were negotiating with the other oil companies?

A. Well, I made it for his benefit.

Q. Prior to the time you approached him?

A. That is right.

Q. You knew that is the price he was asking for the stock? A. Correct.

Q. Now, all of the stock that you bought from Mr. Wescott, did you pay that same price for all of the stock? A. No, I did not.

Q. For what stock did you pay a different price for?

A. Stock that he held since 1926, I think it was 607 shares.

Q. And why did you offer to pay Mr. Wescott—let me withdraw the question. Did you pay Mr. Wescott more or less for the shares that he had acquired in 1926? A. I paid him more.

(Testimony of Frank N. Mattison.)

Q. How much more, sir?

A. I believe the price that he got for the 607 shares was 6-61-50. That is on the record someplace there [87] and I believe it to be correct. It would have to be in the Escrow Agreement.

Mr. Patten: I think that will be Exhibit X.

Q. (By Mr. Patten): Handing you Exhibit X, which shows 6-61-50, is that the price?

A. That is correct.

Q. And why was Mr. Wescott to receive the higher price for those shares?

A. Well, that stock was owned by him prior to 1945. The Continental secured 193-65 for their shares that they held at that time, so we figured—or I figured that Mr. Wescott should receive more money for these shares as actually they had increased in value from the time he originally had time until 1945 in the amount of $93.65. Now, exactly how I arrived at that 6-61-50, off hand, I can't tell you.

Q. Would the fact that Mr. Wescott had to pay more tax on those shares have any bearing?

A. That had considerable bearing.

Q. Would also the fact that they were controlling shares have anything to do with it?

A. Well, as soon as I got them I wasn't worried about the control.

Q. Now, at the time you approached Mr. Wescott [88] with your offer to buy his shares, did you know that his negotiations with Continental Oil had reached an impasse?

A. Yes, I knew it.

Q. And about what was the date you said that

(Testimony of Frank N. Mattison.)

you approached Mr. Wescott with the idea of purchasing his shares?

A. Some time in April in '52.

Q. What did Mr. Wescott tell you when you asked him if he would be willing to sell his shares to you at the price that he mentioned?

A. He agreed to sell them.

Q. Did you get any written document at that time? A. Only verbal at that time.

Q. Now, what did you do next, sir?

A. I went to the Continental.

Q. And about what time did you approach the Continental Oil Company?

A. The latter part of April or early in May.

Q. 1952? A. That's right.

Q. Did you go to Denver, or did they come here?

A. They were here first.

Q. They were here first, and did you later go to Denver? A. I did. [89]

Q. And who went with you?

A. My attorney and Mr. Wescott.

Q. And who was the attorney?

A. Mr. Breshears.

Q. Now, how many trips did you make to Denver to see the Continental Oil Company?

A. On my own, one.

Q. On your own, one. And how long did it take you to reach an agreement with Continental Oil Company at that time, you were negotiating with them for a sale of assets at this point?

A. That is right.

(Testimony of Frank N. Mattison.)

Q. And how long did these negotiations continue for the sale of assets?

A. Well, we probably tore up two or three agreements before arriving at the one that satisfied both Continental and myself.

Q. And is this the agreement which had been previously admitted in evidence here, as Exhibit G, is this the agreement that you finally agreed upon?

(Presenting Exhibit G to the witness.)

A. (Examining the document): I was looking for my signature. That is it.

Q. And about how long had you been negotiating with Continental before this agreement was signed? [90] A. At least two weeks.

Q. Two weeks. At all of your negotiations with the officials of the Continental Oil Company, was Mr. Wescott present, or for how many was he present would you say?

A. He was present at the one meeting that I am positive of.

Q. And the rest he was not present?

A. That is right.

Q. Was your attorney present at all of the meetings?

A. He was present at the principal meeting that consummated this last agreement.

Q. Now, with whom did you negotiate, what officials of the Continental Oil Company did you negotiate with?

(Testimony of Frank N. Mattison.)

A. Well, Mr. Lidell, the Vice-President; Mr. L. L. Aikens, his assistant; Mr. A. T. Smith, attorney for the Continental; Mr. Joe Lentz, Marketing Manager—I believe that is all.

Q. At the time you approached Mr. Wescott, did you have sufficient cash of your own to buy all of the stock of the Wescott Oil Company?

A. I did not.

Q. You intended to liquidate it from the gain, did you not, sir? A. That is right. [91]

Q. When did you start approaching the other stockholders, sir?

A. Immediately after contacting Mr. Wescott on his.

Q. Was it before or after this agreement with the Continental Oil Company? A. Before.

Q. Before. Were these informal contacts, or did you get written documents?

A. First verbal.

Q. First verbal? A. Yes.

Q. Did you make any trips to see them?

A. Yes.

Q. Where did you go to?

A. Two stockholders in Twin Falls, and one in American Falls, Idaho.

Q. Did Mr. Wescott accompany you on these trips? A. He did not.

Q. Did Mr. Wescott go to see you—help you in your negotiations with the stockholders?

A. He did not.

(Testimony of Frank N. Mattison.)

Q. Did you tell them—you told them that Mr. Wescott had agreed to sell his shares, did you not?

A. I did.

Q. Now, when did you start obtaining options from [92] the stockholders?

A. In April of '52.

Q. And are these the options, showing you Exhibit H, are these the options that you obtained from the stockholders?

A. (Examining the Exhibit): That is right.

Q. Did you obtain an option from all of the stockholders? A. I did.

Q. And what, if anything, is the next thing that you did? A. Exercised the options.

Q. Handing you Exhibit I, and I ask you if these are the letters you sent to the stockholders?

A. The first one is the original and the rest are copies. Those are the letters.

Q. And do you recall the date on which these letters were sent, sir?

A. I didn't date only the first one here, that was May 30, and I presume that the rest of them were within a day or two of that date.

Q. That is May, is it not, sir? A. May.

Q. Yes. What were the mechanical arrangements that were made, sir, for the payment of these shares that [93] you exercised your option to purchase? How were you to pay for these shares?

A. Well, they were placed in escrow in the First Security Bank.

(Testimony of Frank N. Mattison.)

Q. Was there anything unusual in the Escrow Agreement with the First Security Bank?

A. Nothing that I can recall.

Q. Phrasing it this way, sir, did the same shares which the shareholders placed in escrow remain in the Escrow Agreement throughout its term?

A. No, they surrendered their individual shares to the company.

Q. About when did that happen, sir?

A. I would say approximately the 10th of June, that probably is a matter of record.

Q. Handing you Exhibit M, would that help you in testifying, sir?

A. The individual certificates were surrendered to the company on June 11.

Q. And what certificate was issued then, sir?

A. The company then issued to Frank Mattison one certificate for 2,189 shares.

Q. Was that all of the outstanding stock of the company? A. That is right. [94]

Q. And what was done with that certificate on June 11?

A. That was placed in the escrow until the stock, the previous stockholders were paid in full.

Q. Now, Mr. Mattison, were the physical assets of the Wescott Oil Company transferred to you?

A. They were.

Q. Do you recall the date on which they were transferred, sir? A. June 16.

Q. And were those documents filed in the various counties where the Wescott Oil Company properties

(Testimony of Frank N. Mattison.)

were located? A. They were.

Q. And the various taxes paid on the transfer?

A. Documentary taxes, yes, sir.

Q. And these are the—without examining in detail—were these the documents by which the title of these properties were transferred to you?

A. Whether they are all of them, I am not positive, there was a tremendous number.

Q. And who prepared the documents?

A. Mr. Breshears.

Q. Then, on the same day, or a day or two later, did you transfer these same assets to the Wescott Oil [95] Corporation? A. Yes, sir.

Q. And these, in general, are the legal documents effecting that transfer?

A. That is right.

Q. Was this on the same day, or the next day?

A. That was an awful long day. I think it was probably the same day.

Mr. Foye: May it please the Court, I think the record speaks for itself on that, June 16.

Q. (By Mr. Patten): And were these documents, were they filed in the various counties, those that required to be filed? A. They were.

Q. And the documentary stamps paid on those?

A. That would be the Wescott Oil Corporation, that is, I was not Secretary-Treasurer of that company at that time.

Q. Now, I notice a number of conveyances from you to the Wescott Oil Corporation are missing, do you know where they might be, sir?

(Testimony of Frank N. Mattison.)

A. They would belong to the Wescott Oil Corporation. All of the deeds and the abstracts are kept for the Wescott Oil Corporation by the Continental Oil Company.

Q. What amount did you receive, sir, from the Continental [96] Oil Company or the Wescott Oil Corporation for the sale of these assets?

A. Well, that is a matter of record, but it would be one million six hundred eighty some-odd-thousand dollars.

Q. What was the first amount you received?

A. $1,400,000.

Q. Was that a check from the Continental Oil Company?

A. I can't recall for sure, but I'm fairly sure that it was from the Continental Oil Company.

Q. And what was done with that check, sir?

A. That was turned over to the First Security Bank.

Mr. Foye: I will object to that question and ask that the answer be stricken on the grounds that we have stipulated that Continental Oil Company paid to the First Security Bank $1,400,000 on June 16, 1952.

The Court: He may answer.

Q. (By Mr. Patten): What was done with the check?

The Witness: Well, we tried to get a picture of it but it seems that the First Security Bank didn't photostat at that time, at least they couldn't find it.

(Testimony of Frank N. Mattison.)

Q. What is your memory of what was done with the check? [97]

A. I thought the check was made out to Frank Mattison and endorsed by me and turned over to the First Security Bank, but I couldn't swear to it.

Q. And what—how were the proceeds of the check applied, sir?

A. $265,000 to the First Security Bank on a note due them.

Q. By whom?

A. Wescott Oil Company.

Q. And the remainder to the stockholders?

A. To the stockholders.

Q. Now, at a later date, did you receive any additional funds from the Wescott Oil Corporation for these assets? A. I received a check.

Q. Handing you Plaintiff's Exhibit P, is this the check you received?

A. (Examining the document): That is the top of the check, and the amount is correct, it is $289,-399.07.

Q. And what did you do with that check?

A. Deposited to my account at the First Security Bank.

Q. And what did you do with the proceeds of this check, sir, or the second check which you received?

A. Paid the balance on the note of $45,000 and paid [98] a note that I owed to Mr. Wescott of two hundred and some-odd-thousand dollars.

Q. Was that note given for the purchase of some of Mr. Wescott's shares?

(Testimony of Frank N. Mattison.)

A. That is right.

Q. What did you do with the remaining funds, remaining from this check?

A. There was interest paid on the note to the bank, and escrow fees paid, and the balance was in my personal account and used to pay Income Taxes and various expenses.

Q. Referring to the year of 1952, what expenses, if any, did you incur in connection with this transaction?

A. Legal expenses and accountant's fees.

Q. Do you recall the amount of those expenses, sir?

A. The legal expense was $2,500 plus some telephone calls—about eleven dollars and some odd cents, and I believe the accountant's fees were $750.

Q. Handing you Exhibit A, and calling your attention on the page thereof, to the amount of $3,629.19, is that the correct amount of your expenses in connection with this transaction?

A. (Examining the Exhibit): That is in '52, yes.

Q. How much did you pay for the shares which you purchased from the other stockholders, sir, in total? [99] A. In total?

Q. Yes, sir.

A. Well, I'd have to look at the record to get the exact amount.

Q. What record would help you in that connection?

A. The Income Tax record would. (The docu-

(Testimony of Frank N. Mattison.)

ment referred to was presented to the witness for examination.) Were you asking the amount paid, just to the stockholders?

Q. Yes, sir.

A. I think there is another record there that is better than this one. This is the entire cost basis which includes considerably more.

Q. Do those records help you any, sir, or would the option agreements?

(Witness examining documents.)

The Court: While he is checking the records we will take the afternoon recess.

(A short recess was taken.)

Direct Examination
(Continued)

By Mr. Patten:

Q. Mr. Mattison, during the recess, have you ascertained the amount you paid for the stock of the Wescott Oil Company that you purchased in 1952?

The Witness: I had the figures here a minute ago.

(Exhibit presented to the witness.) [100]

A. $1,347,480.57.

Q. Have you examined Exhibit A, sir?

A. I have.

Q. And what is Exhibit A, sir?

(Testimony of Frank N. Mattison.)

A. The Tax Return of Frank N. and Ida G. Mattison for the year 1952.

Q. Are all of the funds or profits which you received as the result of the litigation of the Wescott Oil Company during 1952 reported in that return? A. They are.

Mr. Foye: That is objected to on the grounds that it assumes the determination of the instrument in favor of the taxpayer and so far as he asks whether the amount received are on the liquidation of the Wescott Oil Company.

The Court: Will you read the question back, please?

(The last question was read by the Reporter.)

The Court: That is referring to the 1952 return?

Mr. Patten: During 1952. May I rephrase the question?

Q. (By Mr. Patten): Are all the assets, or money which you received during 1952 as a consequence of the liquidation of the Wescott Oil Company reported in that return, during 1952?

The Witness: They are. [101]

Q. Did you receive, during the year 1952, any other funds—any funds or any property which is not reported in that return? A. No, sir.

Q. Is the basis of your shares correctly reported in that return?

Mr. Foye: That assumes the question at issue, and I will object to the question on that basis.

(Testimony of Frank N. Mattison.)

The Court: I don't quite understand your question, Mr. Patten.

Q. (By Mr. Patten): Is the amount that you paid for the shares of the Wescott Oil Company correctly reported in that return?

A. They are.

Q. Are the expenses which you incurred in connection with this transaction correctly reported in that return? A. They are.

Q. Now, in connection with this transaction, did you have occasion to consult with Mr. Costello?

A. Mr. Costello was employed—Costello and Miller was employed by me in the transaction involving the sale of the assets.

Q. And that is Mr. Costello, here?
(Indicating.)

A. That is right. [102]

Q. And when did you employ Mr. Costello?

A. In the latter part of April or early in May, 1952.

Q. And for what purpose did you employ Mr. Costello? A. To assist me in tax matters.

Q. In whose tax matters?

A. My tax matters.

Q. Your personal tax matter, sir?

A. That is right.

Q. Specifically, what problem did you ask Mr. Costello about?

A. The principal problem was the question of whether the claim would be made that the com-

(Testimony of Frank N. Mattison.)

pany liquidated the assets instead of me, personally, thereby incurring a tax at the corporation level.

Q. About what would the amount of tax been involved if the Government made the claim?

A. Approximately $257,000.

Q. And what would have happened in connection with the liquidation had the Government made such a claim?

A. Well, I'd probably be in the same condition as Joe Louis is today.

Q. You would owe a great amount of money?

A. That's right.

Q. Now, what did Mr. Costello tell you about the [103] tax position of the corporation?

A. I think I was convinced that it was safe, but he still contended that the Government might still attempt to claim that it was a liquidation by the corporation.

Q. Now, at any time did you consult with Mr. Costello concerning your own tax liability, how much money you were going to make out of this liquidation and how it would be taxed?

A. I did not.

Q. Did you ever discuss with Mr. Costello how much money you were going to make out of the result of the liquidation and whether it was long term or short term, and when it would be realized.

A. To the best of my knowledge, no.

Q. Did you ever consult with Mr. Costello the advantages of delaying when you would get this money? A. I did not.

(Testimony of Frank N. Mattison.)

Q. Have you ever been a Director of the Wescott Oil Company? A. I have not.

Q. Now, when did you resign as Secretary and Treasurer of the Wescott Oil Company?

A. I'm not positive of the date, exactly, but I think it was on June 12, 1952. [104]

Q. Why did you resign, sir, at that time?

A. I didn't believe that an officer of the corporation should conduct the liquidation insofar as selling the assets.

Q. Why didn't you believe that the officers of the corporation should conduct the negotiations?

Mr. Foye: I will object on the grounds that is not what he testified to. He said he didn't believe that an officer of the corporation should liquidate and sell the assets.

Q. (By Mr. Patten): Well, why didn't you believe that an officer of the corporation should sell the assets?

A. I was still afraid of the tax consequences.

Q. After you resigned as Secretary and Treasurer of the Wescott Oil Company, were you authorized to sign checks?

A. I still was, yes.

Q. And did you sign some checks?

A. I did.

Q. After the corporation begun its process of dissolution and winding up, could you draw checks on the corporation's bank account?

A. I could, with the signature of another.

Q. Could you, even with the signature of an-

(Testimony of Frank N. Mattison.)

other [105] person, draw on these funds for any purpose which you wished? A. No, sir.

Q. For what purpose could you draw on these funds? A. For paying bills, taxes.

Q. Prior to the time the funds in the bank account of the Wescott Oil Company were distributed to you, did you make any use of those funds for your personal benefit? A. No, sir.

Q. Did you ever discuss with the Officers and the Directors of the Wescott Oil Company the timing of the dissolution, how long it would take?

A. I did not.

Q. Did you ever request the Officers and the Directors of the Wescott Oil Company to delay the dissolution? A. I did not.

Q. Referring now to the year 1953, sir, what funds and property did you receive during 1953 as the result of the dissolution of the Wescott Oil Company?

A. I received the cash balance on hand, and the stock of the Lily Seed Company.

Q. Handing you Exhibit N, and referring to the last check there, is that the check which you received, sir? A. That is correct.

Q. And what is the amount of that check?

A. $101,585.76. [106]

Q. And when did you receive that check, sir?

A. On the 12th of May, 1953.

Q. And what did you do with the proceeds of that check, sir?

(Testimony of Frank N. Mattison.)

A. I deposited it to my account in the First Security Bank.

Q. And what have you used the proceeds of that check for, sir?

A. Income Tax purposes, and placed some of it in the savings account.

Q. Handing you Exhibit 3—Plaintiff's Exhibit No. 3 (Exhibit Q), and ask you if you know what that is?

A. That is the money I received in the sale of the Lily Seed Company stock.

Q. What is the amount, sir? A. $1,000.

Q. And to whom did you sell that stock, sir?

A. Mrs. Fred Lily .

Q. And when did you sell that stock, sir?

A. That was probably a few days prior to the date the check came through.

Q. What is the date of the check?

A. I presume it's the date of the deposit here, which is May 13, 1955.

Q. But you received the stock from the corporation [107] in 1953, did you not, sir?

A. Some time in '53, after May 12.

Q. Now, in addition to the Lily Seed stock and the check for $101,585.76, did you receive any other funds during 1953 as a result of the liquidation of the Wescott Oil Company?

A. An insurance refund. I believe the amount was $275.90.

Q. Handing you Plaintiff's Exhibit B, I ask you to identify Plaintiff's Exhibit B.

(Testimony of Frank N. Mattison.)

A. Frank N. and Ida G. Mattison Tax Return for 1953.

Q. Are all of the funds which you received during 1953 as a result of the final dissolution of the Wescott Oil Company reported in that return, sir?

A. To the best of my knowledge.

Q. Do you know of any other income that you received during 1953 that is not reported in that return? A. I do not.

Q. During the year 1953, did you incur any expenses, sir, in connection with the dissolution of the Wescott Oil Company? A. Very little.

Q. Is that—are those expenses correctly reported on the return? [108] A. Yes, sir.

Q. What is the amount? A. $38.17.

Q. Now, at the time of the dissolution of the Wescott Oil Company—correction—on June 16, 1952, how many—approximately how many pieces of property did the Wescott Oil Company own?

A. Approximately 65.

Q. And on that property, what was located thereon?

A. Wholesale plants and service stations.

Q. Do you recall about the number of bulk plants that you had?

A. Twenty-four, with one in progress.

Q. How many filling stations did the company have?

A. Actually, company owned would be around 40, as near as I can remember without access to the records.

(Testimony of Frank N. Mattison.)

Q. And where were the properties located, sir?

A. From Ashton, in eastern Idaho, down through Idaho Falls, Blackfoot, Pocatello, American Falls, Rupert, Burley, Twin Falls, Buell, Wendell, Haley, Fairfield, Boise, Melba, Wilder, Marsing, Caldwell, McCall, Jordan Valley, Vail.

Q. Were they kind of in a "U" shape?

A. In a "U" shape, yes.

Q. About how many pieces of personal property did [109] Wescott Oil Company own?

A. Well, we loaned out considerable equipment to farmers and retail dealers over the State, that would be several thousand.

Q. How many bank accounts did the Wescott Oil Company have on June 16, 1952?

A. I'd say approximately 15. I'd still have to look at the record on that.

Q. How many Income Tax Returns did Wescott Oil Company file each year? A. Three.

Q. What were the three?

A. State of Oregon, State of Idaho, and the Federal Income Tax.

Q. What other tax returns did the corporation file?

A. Gasoline Tax; Ton-Mile Tax, Idaho and Oregon; Social Security Tax; Withholding Tax; Unemployment—there may be a few more miscellaneous.

Q. Did you have any idea, sir, what the balance in the banks was on June 16, 1952?

A. According to the bank statements of the 16th

(Testimony of Frank N. Mattison.)

of June, we had approximately $576,000.

Q. And that was—what happened to that money?

A. Some of it, of course, would be from checks outstanding, and the rest would be paid out in bills from [110] then on until the end of the year.

Mr. Patten: I ask these two checks be marked as Plaintiff's Exhibit, next in order.

The Clerk: That would be AA.

(The documents referred to were marked Plaintiff's Exhibit AA for identification.)

Q. (By Mr. Patten): Mr. Mattison, I am handing you two checks that have been marked for purposes of identification as Plaintiff's Exhibit AA, I wonder if you could tell us what those checks are, sir?

The Witness: The check of $671.05 to Ray Brimhall Company, 758 West 14th North, Salt Lake City, Utah, was in payment of a disputed account that we didn't know we owed until we started working on it some time in December and finally compromised a bill for $671.05.

Q. What is the next check, sir?

A. The next check is a payment by the Wescott Oil Company of $2,500, dated December 31, 1952, to Ralph R. Breshears, Boise, Idaho.

Q. That is for Mr. Breshears' services to the company? A. That is right.

Q. I would like to offer—these are checks of the Wescott Oil Company, are they not? [111]

A. That is right.

(Testimony of Frank N. Mattison.)

Q. Do they bear your signature?

A. One is mine and one is Kramer, and one is mine and one is Wescott.

Mr. Patten: I would like to offer Plaintiff's AA in evidence.

Mr. Foye: No objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit AA and was received in evidence.)

Mr. Patten: May I see Exhibit N, please, sir?

Q. (By Mr. Patten): I am handing you Plaintiff's Exhibit N for the second time. Would you identify the other two checks in there, sir, what is the first check?

The Witness: The first check is dated March 12, 1953.

Q. What is the amount? A. $23,822.44.

Q. And for what purpose?

A. To the Director of Internal Revenue, Federal Building, Boise, Idaho.

Q. For what purpose was that check issued, sir?

A. The Income Tax of the Wescott Oil Company for 1952. [112]

Q. And what is the next check, sir?

A. The next check is dated March 12, in the amount of $2,595.78 to the State Income Tax Division, Boise, Idaho, for the State of Idaho Income Tax for the year 1952.

Q. Do you know when the returns to which

(Testimony of Frank N. Mattison.)

these checks were filed were prepared? Handing you Exhibits C and D, do you know when those returns were prepared?

A. Early in March, 1953. The next one would be early in May, 1953.

Mr. Patten: Exhibit M, please.

Q. (By Mr. Patten): Mr. Mattison, handing you Exhibit M, and calling your attention to Certificate Number 55, when was the notation placed on the back of that Certificate? Is there a notation on the back of the Certificate? A. There is.

Q. And when was the notation placed there, sir?

A. June 16.

Q. When did the Security First National Bank give you that Certificate, sir?

A. After the money was paid in in the escrow.

Q. And where was that Certificate kept until the time it was put in the book, there?

A. In my office.

Q. I see. And when was the word "cancelled" stamped on that Certificate?

A. Immediately after I received the final payment from the Wescott Oil Company.

Q. And when would that be, sir?

A. On the 12th day of May, 1953.

The Court: What was the date, '52, or '53?

Mr. Patten: '53, sir. Counsel tells me there might be some confusion about this.

Q. (By Mr. Patten): When was the notation put on there, what year?

(Testimony of Frank N. Mattison.)

The Witness: 1952.

Q. And when were the words "cancelled" put on there? A. 1953.

The Court: Did you say, Mr. Mattison, that you held that Certificate in your office from June, 1952, until May 12, 1953?

The Witness: That is right, sir.

Q. (By Mr. Patten): Now, Mr. Mattison, at the time you purchased the stock from the other stockholders of the Wescott Oil Company, did you have any side agreement with them that you would give them back any money from it, under any circumstances? A. I did not.

Q. Did you have any agreement with them that they [114] would reimburse you if the assets—if the liabilities of the company exceeded the remaining assets? A. I did not.

Q. Have you paid over or given any of the profit which you received on this liquidation to Mr. Wescott? A. No, sir?

Q. To Mr. Eberle, or any other of the stockholders? A. No, sir.

Q. Did you have any agreement in writing with anyone other than the documents which are in evidence here? A. No, sir.

Q. When were your returns—your individual returns for the year 1952 and 1953 audited by the Internal Revenue Service?

A. I can't give you that exact date.

Q. Can you remember approximately the year?

A. '54, as near as I can recall.

(Testimony of Frank N. Mattison.)

Q. Who made that audit, sir?

A. Mr. Charles Peterson, Jr.

Q. Did you agree to the adjustment which Mr. Peterson proposed? A. I did not.

Q. Did you receive an assessment from the Internal Revenue Department?

A. Later on, yes. [115]

Q. And did you pay that assessment?

A. I did.

Q. And you instituted this suit to recover it?

A. That is right.

Q. Did you have any conferences with anyone in the Revenue Service, besides Mr. Peterson?

A. Later on, yes, we had a conference with what they call the next level, at which time I had retained Mr. Costello and Mr. Miller, and I believe Mr. Costello appeared at the first conference.

Q. And so you next, that was—when did Mr. Costello and Mr. Miller become interested in your personal tax affairs?

A. After the Revenue Agent had made an additional assessment.

Mr. Patten: You may inquire.

Cross-Examination

By Mr. Foye:

Q. Mr. Mattison, one preliminary matter. May I see Exhibit Y—Exhibit Z. This computation that you made, Mr. Mattison, it is not quite as simple as that is it, especially the second way you did it?

The Witness: You mean the proof?

(Testimony of Frank N. Mattison.)

Q. The Computation, sir, determining the price. A. Very simple, to me. [116]

Q. Can you determine the price at which you have to sell the stock to recover all the Income Tax that you have to pay until you know what the Income Tax is?

A. Figuring on the basis of the capital gain, yes.

Q. But you—until you know the price you don't know what the tax is, do you, Mr. Mattison?

A. I know what the long term capital tax gain is.

Q. You know what the rate is? A. Yes.

Q. But you cannot apply that rate to the price until you determine the price, can you?

A. After anyone tells me what they have to have net, I can tell them the price they must receive to get that net figure.

Q. And even though one of the ultimates of the net is Income Tax which you can't determine until you know the price?

A. Only if the Income Tax is presumed to be the long term capital gain tax.

Q. Well, let me go back with you just a minute. You can't determine the amount of an Income Tax until you can apply a rate to a price, can you, sir? My point is, Mr. Mattison, that you have two unknows in making that computation and it has to be made through an algebraic computation, does it not, sir? [117] A. That is right.

(Testimony of Frank N. Mattison.)

Q. Did you make that algebraic computation yourself, sir?

A. No, I used the give and take.

Q. Who made that for you?

A. I made it myself.

Q. What method did you use?

A. Give and take.

Q. Pardon me.

A. The process of elimination, the give and take.

Q. I don't understand you, will you explain that, sir?

A. That is a method of working back and forth until you arrive at the correct answer.

Q. Trial and error? A. Yes.

Q. Now, Mr. Mattison, did you contact all of the stockholders personally to secure options to purchase their stock?

A. All but one with 10 shares of stock.

Q. Who was that?

A. A Mrs. Mary Gambel.

Q. Where did she live?

A. Back in New York State.

Q. And how did you contact her? [118]

A. She had 10 shares which were in the hands of the First Security Bank with the authority to handle it.

Q. Did you contact all of the rest of the stockholders of the Wescott Oil Company yourself to ask if you could buy their stock? A. I did.

Q. Did you contact J. D. Dollar, sir?

A. I did.

(Testimony of Frank N. Mattison.)

Q. Have you met J. D. Dollar?

A. Yes, sir.

Q. Mr. Mattison, you were the former Secretary-Treasurer of the Wescott Oil Company, were you not? A. That is right.

Q. As such, what were your duties?

A. Accounting duties.

Q. You kept books?

A. With assistance, yes.

Q. From whom did you get assistance?

A. We have an Office Manager, plus a considerable amount of clerical help.

Q. And what else did you do there besides keep the books and accounting?

A. Pay the bills, sign the checks, sign deeds, certificates——

Q. Have you had any formal training in accounting [119] matters, Mr. Mattison?

A. Any what?

Q. Any formal training in accounting matters?

A. From experience since 1918.

Q. No formal education?

A. Yes, correspondence courses, books, etc.

Q. Did you make out the corporation Income Tax Return, sir?

A. I did, up until the last two or three years.

Q. Until the last two or three years?

A. Yes.

Q. Who made out the corporation returns for 1952 and 1953?

(Testimony of Frank N. Mattison.)

A. The former Office Manager, then Secretary and Treasurer, Wayne Hancock.

Q. Why did you relinquish that task to him?

A. I was beginning to take things a little easier, I didn't do very much work.

Q. At the time you made out the corporation Income Tax Return, did you have help or advice from anyone in doing that? A. No, sir.

Q. Did you ever have occasion to do any research on Federal tax matters, Mr. Mattison?

A. Yes, sir. [120]

Q. You did, in what connection was that, sir?

A. We have a Prentice-Hall book on taxation.

Q. And you did research in that for yourself, did you? A. For years.

Q. For the purpose of preparing the corporation returns? A. That, and individual.

Q. Your own individual return?

A. My own and Mr. Wescott's.

Q. Did you make out returns for anyone else, sir?

A. Mr. Wescott's sister, I helped—not make them out.

Q. I think you testified that you had been associated with Mr. Wescott in business and personally for a good many years. A. That is right.

Q. And that you knew that he had been negotiating with the Continental Oil Company as the controlling stockholder of the Wescott Oil Company in Continental's attempting to buy out the Wescott Oil Company?

(Testimony of Frank N. Mattison.)

A. I understood it was to buy the shares of the company.

Q. Pardon me, sir?

A. I understood it was to buy the shares of [121] the company.

Q. Yes. You did know that these negotiations had been going on? A. I did.

Q. Now, did you know why it was that Continental Oil Company wanted to come back into the territory that they had formerly been in?

A. I did.

Q. What was that reason?

A. The pipeline, built primarily by the Continental Oil Company from Wyoming to Salt Lake which would connect with the pipeline from Salt Lake to Boise opened up a market in this territory for their products.

Q. Would you say it was almost essential for them to come back in here if they wanted to compete in this area?

A. As I understood, they were coming back regardless if they purchased any of the assets of the Wescott Oil Company or not.

Q. Wouldn't that have been difficult for them to do without having any filling stations in the area?

A. The other majors have done it.

Q. Did they have to secure permission from any governmental agencies to come back in here on the pipeline without owning some property interests in this territory? [122]

(Testimony of Frank N. Mattison.)

A. I don't believe so, sir. I'm not familiar with the pipeline legal——

Q. Now, did you attend any of the meetings held by Mr. Wescott and the representatives of Continental Oil Company in 1951, sir?

A. I am pretty sure I did not.

Q. You are pretty sure you did not. Did you know on what basis they were negotiating?

A. Yes; I did.

Q. And what was that basis?

A. Trading Continental stock for Wescott Oil Company stock.

Q. And you knew that plan didn't go through?

A. Later, yes.

Q. When did you find that out?

A. Some time late in '51.

Q. Then, I assume that you knew in 1952, representatives of the Continental again approached Mr. Wescott about the same transaction?

A. I did.

Q. And at this time they were talking about buying the stock for cash, were they not?

A. That is what I understand, yes.

Q. Mr. Wescott asked you to attend some of those meetings, did he not? [123] A. One.

Q. Only one?

A. As far as I remember, one.

Q. You only recall having attended one of those meetings, where was that held?

A. In Denver.

Q. Didn't you attend any of the meetings held

(Testimony of Frank N. Mattison.)

in Boise? A. I did not.

Q. What was the purpose of Mr. Wescott asking you to attend that meeting down in Denver, do you know? A. To give him accounting advice.

Q. In what matters, on the price that he should get for the stock? A. That is right.

Q. You knew, didn't you, that in those negotiations they had arrived at a fairly definite price of $607 per share for the stock?

A. I don't recall the exact amount, it was somewhere close to that.

Q. Did you know that those negotiations did not result in any agreement of sale? A. I did.

Q. And do you know what the reason was that they did not? [124]

A. Well, I really couldn't speak for them, no, sir.

Q. You don't know why those negotiations broke down? A. No; I do not.

Q. You do not know? A. No.

Q. Do you recall that last Wednesday your deposition was taken, Mr. Mattison? A. Yes, sir.

Q. Have you seen that deposition?

A. I might have glanced at it.

Q. May I show it to you?

Mr. Patten: You may put it in evidence.

Mr. Foye: I don't intend to put it in evidence. I'm not trying——

Mr. Patten: It will be very helpful.

Mr. Foye: Well, I have not planned to. You may offer the deposition in evidence, Mr. Patten, but I

(Testimony of Frank N. Mattison.)

have no plans to do that. Do you object if I show it to him?

The Court: The original of the deposition may be published.

Q. (By Mr. Foye): I show you page 13 of the original deposition of yours, taken last Wednesday, and ask you—not quite half way down the page—(reading): "Question: And did you know [125] what the reason was that he was no longer negotiating with the Continental?" You see that, Mr. Mattison? A. I do.

Q. And what was your answer?

A. They refused to buy the stock.

Q. Thank you, sir. Do you know why they refused to buy the stock? A. No, sir.

Q. Do you know today why they refused to buy the stock, sir? A. No, sir.

Q. You do not know? A. No, sir.

Mr. Patten: Did they refuse to buy the stock at any price or did they refuse to buy it at this price?

Mr. Foye: After all I asked him does he know the reason they refused to buy the stock?

Mr. Patten: At any price, or the price you are asking?

Q. (By Mr. Foye): I will ask you, Mr. Mattison, if you knew why they refused to buy the stock at the price he asked?

The Witness: They did not explain it to me why they didn't, no.

Q. Who is "they"? [126]

A. The Continental Oil Company.

(Testimony of Frank N. Mattison.)

Q. I take it then you do not know?

A. That is right.

Q. And you never knew?

A. To the best of my knowledge, no.

Q. Did it ever occur to you to ask, Mr. Mattison, after all of the negotiations had gone on and they had arrived, or come close to arriving at a price, did it ever occur to you to ask why those negotiations broke down?

A. I'm not very curious.

Q. You never asked? A. No, sir.

Q. Did you ever tell C. J. Wescott that you thought the reason they didn't buy the stock was that they wanted to liquidate the corporation and buy the assets?

A. I don't recall talking to Mr. Wescott in that line, no.

Q. I take it that the answer to my question is "no"? A. That is right.

Q. You did know that those negotiations broke down, did you not, Mr. Mattison?

A. Naturally.

Q. Pardon me? A. Naturally. [127]

Q. Why, naturally?

A. I don't see how they could talk to me if they had not broken down.

Q. Did they come to you after those negotiations broke down, Mr. Mattison?

A. I went to them.

Q. You knew then, before you went to them that they had broken down? A. I think I did.

(Testimony of Frank N. Mattison.)

Q. How did you find out?

A. Well, the meetings stopped and no more discussion with the Continental Oil Company as far as I knew, so then, I presumed——

Q. How did you know that the meetings stopped?

A. Mr. Wescott was in the same office that I am in and I knew practically what he was doing most of the time, whether he was in town or out-of-town.

Q. Did you go to the last meeting that he had?

A. The last meeting I went to was the meeting I had.

Q. That is not the question. I asked you, Mr. Mattison, I asked, did you go to the last meeting that Mr. Wescott had with the Continental?

A. I couldn't swear whether that was the last or [128] not. I went to one meeting with him.

Q. That was in Denver? A. That is right.

Q. Did you stay overnight in Denver, Mr. Mattison? A. I did.

Q. At what hotel did you stay in?

A. The Brown Palace.

Q. Where were the meetings held?

A. In the office of the Vice-President in the Continental Oil Company Building.

Q. Were you present at the meeting at which Continental told Mr. Wescott they would not buy the stock? A. I don't believe so.

Q. How did you find out that they wouldn't buy the stock?

A. Well, that question, you asked the question

(Testimony of Frank N. Mattison.)

awhile ago. I presume that I must have got word from Mr. Wescott; it's possible.

Q. It's possible that you must have got word from Mr. Wescott? A. Yes.

Q. Is it also possible that you could have been at that meeting?

A. I did not stay in the meeting all of the time, so, if that came up it must have been some time when I was [129] out of the office.

Q. Now, will you answer the question? Is it possible that you could have been at the meeting?

A. It is possible. My memory isn't quite that good. I could have been.

Q. You remember the first day you came to Idaho, don't you, Mr. Mattison? A. Yes, sir.

Mr. Patten: Which meeting are you talking about?

Mr. Foye: The last which Mr. Wescott had with Continental Oil Company.

Mr. Patten: Will you place the date, please?

Mr. Foye: I don't know that date.

Mr. Patten: How could he know what date?

The Court: I think you have the witness confused, Mr. Foye. He said he was at one meeting. Now, he doesn't know whether that was the last one or not.

Mr. Foye: I think subsequent to that time, your Honor, I asked him if he was at the meeting that——

The Court: He may understand you, but I do not. He does not know whether you are talking

(Testimony of Frank N. Mattison.)

about the last meeting or the meeting he attended. You had better clarify it.

Mr. Foye: I certainly will, sir. [130]

Q. (By Mr. Foye): Were you at the meeting at which Continental told Mr. Wescott that they would not buy the stock?

A. I can't recall any conversation of that character.

Q. Was it possible that you could have been at that meeting?

A. I would have remembered, I think, that kind of a turn down on the stock. That is what you are asking, that they turned him down in the purchasing of the stock?

Q. You can say positively that you were not at that meeting? A. No; I can't say.

Q. You might have been?

A. There was a lot of things going on there in a few months there, Mr. Wescott's sickness and the subsequent developments in the turning over of the company and starting a new company. My memory is good, but it isn't perfect.

Q. Might you have been at that meeting?

A. It is possible.

Q. After those negotiations broke down, Mr. Wescott started looking for someone to liquidate the company, did he not?

A. I didn't get that question. [131]

Mr. Foye: Will the Reporter read the question, please?

(Testimony of Frank N. Mattison.)

(The last question was read by the Reporter.)

A. This I do not know.

Q. (By Mr. Foye): Mr. Mattison, I direct your attention to page 28 of that deposition, the third line from the top. That is your answer, isn't it, sir, to a preceding question that I asked you?

A. The answer here that I have is, "Well, I believe if it had not been liquidated by me that he would have gotten someone to liquidate it on the same terms."

Q. Was he looking for someone to liquidate the corporation?

A. I didn't say that in this, and I don't know yet.

Q. You think he might have gotten somebody else to liquidate it if you hadn't liquidated it, isn't that right, Mr. Mattison?

A. I think he could have.

Q. That is what you said in your deposition, sir. Then subsequent to the time of the close of the negotiations of Mr. Wescott broke down you started negotiating with Continental yourself, is that right?

A. That is right. [132]

Q. And you thought you could liquidate the corporation without incurring any additional tax out of the corporation, isn't that right, sir?

A. Any additional tax against the corporation, yes.

Q. When did you begin your negotiations with the Continental?

(Testimony of Frank N. Mattison.)

A. The latter part of April, or early in May.

Q. How many meetings did you have, sir, do you recall? A. At least two.

Q. With whom?

A. Mr. Lidell, Mr. Aikens, Mr. Smith.

Q. You had one in Denver and one in Boise?

A. That's right.

Q. Do you recall whether there might have been any more than that?

A. I might have talked to some of them individually.

Q. In person? A. Yes.

Q. Did you have some telephone conversations about it? A. Yes.

Q. Some letters written back and forth?

A. No letters.

Q. No letters? I direct your attention to page 12 [133] of your deposition, sir. You make reference there to a letter written to you by Mr. Aiken of the Continental Oil Company, did you not, dated May 8, 1952? A. I read it, yes.

Q. So there were some letters going back and forth between you?

A. As far as I know that is the only letter I could find.

Q. You didn't write to them? A. I did not.

Q. How long before that letter was written, do you recall, that you were negotiating with Continental? A. From one to two weeks.

Q. At that time you were negotiating with Con-

(Testimony of Frank N. Mattison.)

tinental to sell the operating assets of the Wescott Oil Company to them, is that right?

A. That is right.

Q. And how many meetings did Mr. Wescott attend of those meetings at your request?

Mr. Patten: Are these Mr. Mattison's meetings?

Mr. Foye: Yes, sir; that's right.

Mr. Patten: With the Continental?

The Witness: One or two.

Q. (By Mr. Foye): One or two, you are not sure which? [134] A. Not positive.

Q. You are sure that there could not have been more than two?

A. I don't believe there was any more than two.

Q. How did you finally arrive at a price for Continental to pay for the assets?

A. They made the offer.

Q. Was it immediately agreeable to you, that price? A. The price was agreeable, yes.

Q. The price was agreeable? A. Yes.

Q. There were no negotiations about price?

A. No. Some of the wording was—I didn't like, however, the price was never changed.

Q. The price was always—the original proposition that they made to you, as far as the price goes is the one you accepted? A. That is right.

Q. How many proposed agreements did the Continental draw up and submit to you for your approval before you finally approved one?

A. One tentative, and they then took out all of

(Testimony of Frank N. Mattison.)

the objectionable features and the May 12 offer was submitted as is.

Mr. Foye: Will you read back the answer? [135]

(The answer was read by the Reporter.)

Q. (By Mr. Foye): So there was only one proposed agreement before the one in evidence here?

A. The only one I can remember in writing, yes.

Q. Were—was the wording of the agreement discussed between yourself and Continental verbally before it was set down in writing the first time?

A. Some features of it.

Q. Some features. Incidentally, did you agree to the agreement sent to you by Mr. Aiken by that letter of May 8, 1952, do you recall?

A. I think immediately after that the agreement of May 12 was drawn.

Q. In other words the one he enclosed to you with that letter was not acceptable to you, is that right, of May 8?

A. Did I say he enclosed an agreement?

Q. Yes. That was page 12.

A. That might have been preliminary, a copy of the offer and at that date, which was May 8, and the other there of May 12, that must have been satisfactory at that time.

Q. Now, at what date did you notify Continental of your acceptance of the offer of the agreement of May 12? [136]

A. I don't think I kept a copy of that letter accepting the offer.

Q. You haven't any idea what date that accept-

(Testimony of Frank N. Mattison.)

ance was made? Perhaps I can refresh your recollection with Exhibit G. Exhibit G, which is in evidence as the offer of agreement between yourself and the Continental Oil Company stating the offer would be good only until June 11, 1952?

A. That's right.

Q. Would it be reasonable to assume that you notified them of your acceptance prior to June 11, 1952? A. I believe so.

Q. Would June 10 be a fair estimate?

A. Some time between the 8th and 10th, I would say.

Q. Thank you. Now, at the time you entered the agreement with Continental you thought that you could buy the stock of the stockholders for $607 a share, did you not? A. Yes.

Q. And after you signed the agreement you secured options to purchase the stock from the stockholders of Wescott Oil Company?

A. That's right.

Q. And those options were accompanied by Escrow Instructions, were they not? [137]

A. Yes, sir.

Q. The options were to expire on May 30, 1952?

A. I think they speak for themselves.

Q. I guess you are right. Do the copies specify the expiration date?

Mr. Patten: I think so.

Q. (By Mr. Foye): May I show you Exhibit H? From Exhibit H, I would like to extract your option to purchase the stock of C. J. Wescott and

(Testimony of Frank N. Mattison.)

ask you, please, sir, what day that option was acquired on, what date the option was acquired?

A. It's dated the 31st of May.

Q. I'm through, are you?

A. I think May 30 was a holiday.

Q. I see. The rest of the options, I think you stated, were exercised about May 30, 1952, were they not? A. I believe so.

Q. Now, Mr. Mattison, who prepared the options and the escrow instructions and the letters exercising the options? A. Mr. Breshears.

Q. Did he prepare all of these at one time, did he?

A. I couldn't say to that, that could be.

Q. Did you notice that the dates were left blank on all of those documents? [138]

A. That is right.

Q. Do you think he prepared them all at one time? A. He probably did ahead of time.

Q. Yes; before any action was taken, that is to get the option, or to get the options before the escrow, or the options on anything like that?

A. Oh, I think so.

Q. Now, had Mr. Breshears represented the Wescott Oil Company before, do you know, Mr. Mattison? A. Yes; he was on a retainer.

Q. Had he ever represented you before, individually?

A. As far as I know I never had a lawyer before.

Q. Mr. Breshears did not represent you before?

(Testimony of Frank N. Mattison.)

A. That's right.

Q. Was the fee paid Mr. Breshears by the corporation for 1952 his normal retainer, that is, $2,500? A. That was in addition to——

Q. In addition to his normal retainer fee?

A. Yes.

Q. Can you tell me, please, sir, for what services that he performed in addition to the normal retainer fee that justified the additional fee?

A. The excessive amount of legal work in drawing up the——

Q. Was it drawing the options and the [139] escrow instructions? A. That is right.

Q. Letters exercising the options?

A. Yes.

Q. Now, do you know how much you paid him, personally, in 1952, sir? A. $2,500.

Q. Do you recall what that was for?

A. That was for my part of the legal work.

Q. In other words, you and the corporation both paid Mr. Breshears a part of the fee for drawing up these documents, that is the Resolution of June 13, 1952, and April 28, 1953?

A. That undoubtedly would be the corporation.

Q. Did you and the Wescott Oil Company split the fee that was charged for preparation of these documents?

A. I presume they were the same amount, I'm not sure on that whether we split or whether he billed me.

Q. My point, Mr. Mattison, did you both pay

(Testimony of Frank N. Mattison.)

Mr. Breshears some money for doing the same work?

A. Not necessarily for doing the same work, no.

Q. Well, now, you testified a few minutes ago that the corporation paid Mr. Breshears a fee for preparing the options and the escrow instructions and the letters of exercising the option, do you recall that testimony? [140] A. Yes.

Q. Did you also pay him a fee for some of that work or all of it?

A. Most of my fee was undoubtedly paid, as far as I can figure it out myself, was for making the agreements, deeds, etc., from Mrs. Mattison and myself to the Wescott Oil Corporation which was not billed against the Wescott Oil Company.

The Court: Mr. Foye, how much longer do you think you will be?

Mr. Foye: Well, I can't anticipate that, your Honor. I'm not very close to being through.

The Court: I think we will adjourn until tomorrow morning at 10:00 o'clock.

(The Court adjourned at 4:30 o'clock p.m.)

September 11, 1957—10:00 o'Clock A.M.

The Court: Mr. Mattison was on the witness stand, was he not?

Mr. Foye: I have a witness coming in from out of town.

(Mr. Frank N. Mattison resumed the witness stand.)

(Testimony of Frank N. Mattison.)

Cross-Examination
(Continued)

By Mr. Foye:

Q. Mr. Mattison, do you recall going to Mr. Fred Costello and showing him your plan for acquiring the assets of the Wescott Oil Company and selling them to the Continental Oil Company?

A. Yes.

Q. Was the plan written out at that time, do you recall? A. I'm not sure.

Q. You think it might have been written out, sir? A. It could have been.

Q. Did Mr. Wescott go with you at that time?

A. No, sir.

Q. Did Mr. Wescott ever go with you to see Mr. Costello as far as you recall?

A. As far as I know, I have never seen [142] Mr. Wescott in Mr. Costello's office.

Q. If the plan was written out, sir, do you recall who might have written it out?

A. The offer and agreements, is that what you are talking about? No.

Q. Well, that is what I was asking. Did you use a proposed copy of the offer of agreement furnished you by Continental or did you have it written out in your own handwriting?

A. No; I used theirs.

Q. You used the offer of agreement furnished by Continental Oil Company?

(Testimony of Frank N. Mattison.)

A. That is right.

Q. You did show him a plan that was written out, did you?

A. I don't remember if that was shown to him in his office or not.

Q. Did you see him at any place other than in his office, sir? A. Yes.

Q. Where was that? I am talking prior to——

A. At another office in the Idaho Building.

Q. Pardon me, sir?

A. Another office in the Idaho Building.

Q. And whose office would that be? [143]

A. I believe it was my attorney's office.

Q. Mr. Breshears? A. Yes, sir.

Q. Now, this conference with Mr. Costello took place, did it, before the plan was set into operation? Do you recall about when it was that you went to Mr. Costello? A. Not the exact date, no.

Q. Generally?

A. I imagine it would be two or three days before the 16th of June.

Q. You sure it was not in May, Mr. Mattison?

A. I'm not positive. I can't remember.

Q. Now, I assume that the reason you went to Mr. Costello with this plan was to secure advice on what, if any, tax effect it would have on the Wescott Oil Company? A. That is right.

Q. Did you also ask him what effect that plan would have on your personal tax situation, Mr. Mattison?

A. I don't believe I asked him that question.

(Testimony of Frank N. Mattison.)

Q. You don't recall asking him that?

A. No, sir.

Q. Then your purpose in going to him was to protect the interests of the corporation?

A. Yes, sir.

Q. Who paid the bill, Mr. Mattison, for that advice? [144] A. I did.

Q. You did, personally? A. Yes, sir.

Q. That was $750? Was it, sir? A. Yes, sir.

Q. Do you recall stating to Revenue Agent C. O. Peterson, Jr., that you paid Mr. Costello $750 for assistance in setting up and reporting this transaction on your return?

A. To the best of my knowledge I did not.

Q. Now, Mr. Mattison, at the risk of being repetitious, I would like to call your attention to the Escrow Instructions for a moment, they are Exhibit H. I believe all of the Escrow Instructions accompanying each of the options are the same, are they, sir? A. Yes.

Q. I will ask you to just follow that, if you will, please. Now, subsequent to the time that the Certificates of the individual stockholders in the Wescott Oil Company were exchanged for one certificate standing in your name, was that Certificate assigned by you to the Wescott Oil Company, as provided in the Escrow Instructions? That is the bottom of the first page of the Escrow Instructions, Mr. Mattison, where it says, "Along with a duly executed assignment of such stock from said Mattison to the Wescott [145] Oil Company."

(Testimony of Frank N. Mattison.)

Mr. Patten: What page is that?

Mr. Foye: The first page of the Escrow Instructions.

Q. (By Mr. Foye): I think that refers to the one certificate of stock standing here, was that certificate assigned to the Wescott Oil Company as recited in the Instructions?

A. I presume the certificate would speak for itself, sir.

Q. I don't believe the certificate has any such assignment on it. Would there be a separate assignment assigning that certificate to the Wescott Oil Company? A. I don't remember it.

Q. You don't remember whether that was done or not? A. No, sir.

Q. Well, do you recall that the certificate was surrendered by the Escrow Agent to you in accordance with the letter which was placed in evidence yesterday by Mr. Gardner? A. I do.

Q. And at that time did you surrender it to the Wescott Oil Company in exchange for the assets as provided on the second page of the Escrow Instructions? Paragraph No. 2, where it says, "Upon written request furnished by Mattison to the said Escrow Agent to surrender the stock [146] to the Wescott Oil Company in exchange for the same to transfer or assignment, and filing, etc."

A. That is on page 2?

Q. Yes, sir. Paragraph No. 2, I believe. Was that done, sir? A. I think so.

Q. Do you recall that it was done at that time,

(Testimony of Frank N. Mattison.)

then, when you surrendered the certificate to the Company, was it marked "Non-transferable"?

A. I believe so.

Q. And what was done with it after that, at that time, if you recall, sir?

A. It was in my hands at that time up until the final dissolution.

Q. It was returned by the corporation to you, sir? A. I think it was in my hands, yes, sir.

Q. The corporation returned it to you?

A. Yes, sir.

Q. Now, you conveyed the operating assets of the Wescott Oil Company to the Continental Oil Company on the same day that they were conveyed to you, did you not, sir? A. Yes, sir.

Q. And on the same date Continental paid $1,400,000 to the Escrow Agent—I believe that has been stipulated. Now, you didn't have enough money to swing the deal any [147] other than through these means, did you, Mr. Mattison?

A. I didn't have enough, no, sir.

Q. Do you recall after the end of May of 1952, the corporate accounts payable were run through the cash account of the corporation rather than being credited to the accounts payable account?

A. I think the same procedure was followed as had been followed in the past.

Q. In other words, accounts payable were first credited to the accounts payable account on the books of the corporation?

A. The company attempted to pay cash.

(Testimony of Frank N. Mattison.)

Q. I see. That was true for all of its operations, was it?

A. Certain taxes were set up in accounts payable.

Q. What type taxes were these?

A. The gasoline taxes.

Q. All other liabilities were run through a cash account, sir? A. The greater part of them.

Q. Now, do you recall any change in the system subsequent to the end of May, 1952, in other words, did you continue to accrue the gasoline taxes as accounts payable, or did you run them through the cash account, too, after the amount was [148] determined?

A. After the 16th of June there was no accrual in the gas taxes, we had no more.

Q. I believe you testified yesterday that the corporate Income Tax for 1952 were paid by the corporation in March of 1953, is that right?

A. That is correct.

Q. Now, the Balance Sheet of the corporation, as of December 31, 1952, showed the exact amount of those State and Federal Income Taxes, did it not? A. I believe so.

Q. I believe you also testified yesterday that you resigned as an officer of the corporation on June 13, 1952, because you were afraid of the tax consequences of selling the assets of the corporation—I believe that is it. Do you recall that testimony?

A. I believe that is what I said.

Q. Were you afraid of the tax consequences to

(Testimony of Frank N. Mattison.)

the corporation, Mr. Mattison? A. Yes, sir.

Q. You were afraid if you sold the assets as an officer of the corporation that it might incur some additional tax on the corporation?

A. That is right.

Q. Mr. Mattison, is it correct to say that your motivating purpose in going into this transaction was to [149] secure the assets of the Wescott Oil Company? A. I believe that is correct.

Q. When you passed the stockholders' resolution of June 13, 1952, was it your intention to completely liquidate the corporation and wind up its business as soon as possible?

A. I think it so states in the resolution.

Q. That was your purpose in passing the resolution? A. I believe so.

Q. Could you tell me, please, what accounts for the difference between the amount of the cash on the books of the Wescott Oil Company as of December 31, 1952, and the amount of cash received by you from the corporation in 1953?

A. The difference would be the Federal and State Income Tax.

Q. No, sir. May I refresh your recollection? I think the corporate balance sheet as of December 31, 1952, had accrued as liabilities the Federal and State Income taxes, do you recall that?

A. Yes, sir.

Q. And that would have been deducted from the cash balances of the corporation as of the end of 1952, wouldn't it?

(Testimony of Frank N. Mattison.)

A. No; it would not. [150]

Q. It would not? A. It would not.

Q. Well, let me ask you this then, was there any difference between the cash account as of December 31, 1952, that is the known accounts payable for the State and Federal Income Taxes, between that and the amount you received in 1953?

A. There shouldn't have been, no.

Q. Mr. Mattison, wasn't there an insurance refund in 1953, and a small interest refund received in 1953?

A. The interest refund was, I think, in April of 1953, and the insurance, I'm not positive, but I believe it was September of 1953.

Q. Both would increase the cash balance of the corporation, would they not?

A. The corporation had been dissolved before the insurance check was received.

Q. Well, would it be fair to say that any amount you received in 1953, upon dissolution of the corporation, over and above the balance of the cash accounts of December 31, 1952, less the State and Federal Income Tax payment was attributable to the insurance refund and interest refund?

A. That is right.

Q. Going back to your negotiations with Continental [151] Oil Company, I think you stated that they submitted at least one proposed form of offer and agreement to you before you accepted one, is that not true? A. A tentative.

Q. A tentative, and you rejected that one?

(Testimony of Frank N. Mattison.)

A. That is right.

Q. And then they submitted another one, did they not? A. That's right.

Q. Did you go over either one of these agreements with Mr. Wescott before you accepted one?

A. I'm not positive over that. I may have showed it to him.

Q. You may have showed it to him?

A. That is possible.

Q. To ask his advice?

A. I asked a great deal of advice from a great many people. I could have.

Q. Did you ask advice of any one else on the particular agreement, do you recall?

A. I believe it was submitted to my attorney.

Q. That was Mr. Breshears? A. Yes.

Mr. Foye: That is all I have. [152]

Redirect Examination

By Mr. Patten:

Q. Mr. Mattison, when you paid Mr. Breshears the $2,500 for his services, did he submit you a bill?

A. Yes, sir.

Q. Did he break that bill down into just what was encompassed in that bill, sir? A. No, sir.

Q. You paid it because you thought it was a fair fee for the service, is that right? A. Yes, sir.

Q. You really don't know what it did encompass?

Mr. Foye: Well, I will object to that. It is an attempt to impeach the witness.

(Testimony of Frank N. Mattison.)

The Court: No; it is redirect examination. You went into that.

Q. (By Mr. Patten): Did you know what was encompassed?

Mr. Foye: I think he testified yesterday as to what was encompassed and I think Mr. Patten is asking him to state that he does not know what was encompassed in it.

The Court: He may answer.

The Witness: I received a statement simply showing the fee of $2,500. [153]

Q. (By Mr. Patten): And did you pay it?

A. I paid it.

Q. Now—Exhibit H, please. Calling your attention to the option agreements and Escrow Instructions with Mr. C. J. Wescott, will you look at that, please, sir? A. I have it here.

Q. Will you look at the date, please, sir?

A. The date on this is May 31. I'm not positive that is my writing.

Q. Can you advance any reason why you waited so late to obtain the option from Mr. Wescott?

A. I had a verbal option with Mr. Wescott prior to this.

Q. Did you consider that satisfactory?

A. To me, yes, sir.

Q. Now, in the operation of your business, is it possible to accrue all of the liabilities of the corporation? A. Not accurately, approximately.

Q. Did you ever have claims and demands made against the corporation for which you had accrued

(Testimony of Frank N. Mattison.)

no liabilities? A. Yes; several months later.

Mr. Patten: That is all.

Mr. Foye: That is all, Mr. Mattison, thank [154] you.

(The witness left the stand.)

Mr. Patten: I would like to call Mr. Miller.

W. F. MILLER

a witness called on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: W. F. Miller.

Direct Examination

By Mr. Patten:

Q. Where do you reside, sir?

A. In Boise.

Q. What is your address, please, sir?

A. Route 4.

Q. And what is your office address?

A. 227 Idaho Building.

Q. And what is your occupation?

A. I am a Certified Public Accountant.

Q. Doing business under what style?

A. Partnership with Costello, Costello and Miller.

Q. And did you state where your offices were?

A. Yes, sir.

(Testimony of W. F. Miller.)

Q. How long have you been engaged in Public Accounting, sir? A. Nearly ten years. [155]

Q. Now, sir, what was your occupation before you became a Public Accountant?

A. I was Revenue Agent with the Federal Government.

Q. And how long were you a Revenue Agent?

A. Four and a half years as a Revenue Agent and a little over two years as a Deputy Collector.

Q. And what is your education, sir?

A. I took the LaSalle Extension University course along with the C.P.A. Coaching, and passed the C.P.A. Examination.

Q. Are you a C.P.A. in the State of Idaho?

A. That is right.

Q. Now, in connection with your occupation as a Public Accountant and as a Revenue Agent, have you had occasion to compute income gains?

A. That has been the major part of my work for the last 17 years.

Q. Have you seen the books and records of the Wescott Oil Company?

A. I think I have glanced at them. I have not gone through them thoroughly, no.

Q. Have you seen Mr. Wescott's tax return?

A. I have.

Q. I mean Mr. Mattison's.

A. I beg your pardon, I did not see Mr. Wescott's; [156] I did see Mr. Mattison's return.

Q. By applying accepted accounting principles to the Exhibit and the stipulation, of which you

(Testimony of W. F. Miller.)

have been informed, have you been able to compute Mr. Mattison's gain in the transaction involving the stockholders of the Wescott Oil Company during 1952? A. I have.

Q. And what is that gain, sir?

A. The gain is $23,276.29.

Q. I am handing you a document, admitted in evidence as Plaintiff's Exhibit T, and ask if you are familiar with that document?

A. It's a Ninety-day Letter, yes, sir, I am.

Q. You have previously examined this?

A. That is right.

Q. Now, by applying accepted accounting principles to the stipulations and Exhibits in this case, do you know of any accepted accounting principles upon which it could be determined that Mr. Mattison realized a gain of $114,900.71 during the calendar year 1952? A. I do not.

Q. By the same process, do you know any basis or any accounting principles upon which it might be determined that the basis of Mr. Mattison's assets were disposed of were $1,245,923.43? [157]

A. No, sir.

Q. Now, Mr. Miller, I would like to ask you a hypothetical question, and for the purposes of this hypothetical question we will assume that during the calendar year of 1952 Mr. Mattison purchased the assets of the Wescott Oil Company and resold those assets, can you compute what his gain would be in the taxable year 1952, based on that assumption? A. Yes.

(Testimony of W. F. Miller.)

Q. And what would that gain be, sir?

A. The gain would be $23,276.29.

Q. Handing you Exhibit A, sir, can you tell us what that is?

A. A copy of Frank N. and Ida G. Mattison's Federal Income Tax Return for the year 1952.

Q. What gain is reported in there on that transaction? A. $23,276.29.

Mr. Patten: Thank you, sir. You may inquire.

Cross-Examination

By Mr. Foye:

Q. Mr. Miller, you are associated, are you, with Mr. Costello in the practice of Public Accounting?

A. Yes, sir.

Q. And the firm is known as Miller and Costello?

A. Costello and Miller. [158]

Q. Costello and Miller, I am sorry. Did you represent Mr. Mattison in the case now on trial before the Internal Revenue Service, sir, your firm?

A. The first that I had was with the conference in the Appellate Division.

Q. Did you represent him?

A. I sat in on the conference, yes, sir.

Q. As a representative of Mr. Mattison?

A. I believe so.

Q. Yes. Your firm represented him at the Administrative Level prior to the Appellate Staff, did it not, sir?

A. Mr. Costello did whatever was done on that I——

(Testimony of W. F. Miller.)

Q. Do you know whether your firm represented him at the Administrative Level?

A. Mr. Costello is my partner and he handled it, yes.

Q. Is your partner authorized to practice before the Internal Revenue Department?

A. I don't believe so.

Q. Did you accompany him to any of the conferences had by the Internal Revenue Service prior to this? A. No.

Q. But your firm did represent him prior to the Appellate Staff hearing, is that right? [159]

A. Anything that was done prior to the time that I sat in on it Mr. Costello handled, he is my partner, and therefore our firm did some work.

Q. Thank you. Has your firm been paid a fee for the work, yet, Mr. Miller?

A. Yes, sir; he was paid a fee, we received a fee.

Q. Have you received your entire fee for that work?

A. The billing of the accounts is the work that Mr. Costello handles, he takes care of it.

Q. Have you or Mr. Miller received your entire fee for the work that was done by you or Mr. Costello in representing Mr. Mattison at the administrative proceeding?

A. You mean Mr. Costello?

Q. I'm sorry.

A. You will have to ask Mr. Costello. When he

(Testimony of W. F. Miller.)

handles the work in our office he takes care of the billing. I had nothing to do with the billing of the account and I don't know.

Q. In other words, as far as you know you have not been paid anything for that work, is that right?

A. Well, the last fee we received from Mr. Mattison, was the last bill that we sent for which we were paid which was in the early part of '53, I think, and I [160] sat in on the conference then.

Q. You have not been paid for that?

A. No; we have received no fee, I am sure.

Q. You have not been paid for the work that you did of representing Mr. Mattison at the administrative proceeding?

A. No, sir; we have not been paid since then.

Q. Now, you gave a figure there, at the beginning of your testimony for the gain accruing to Mr. Mattison upon the transaction in question, did you not? A. That is right.

Q. Was that first figure of gain that you gave based upon a recognition of gain upon which basis, the liquidation of the corporation?

A. Based on the partial liquidation.

Q. Based on the partial liquidation of the corporation? A. That is right.

Q. Yes. Now, what Exhibits have you examined, personally, Mr. Miller, the Exhibits which are in evidence in this trial?

A. The Ninety-Day Letter and Mr. Mattison's tax return.

(Testimony of W. F. Miller.)

Q. Did you examine them before you came into the courtroom this morning? [161]

A. Yes, sir.

Q. What other Exhibits?

A. I don't remember them all.

Q. Did you examine any other Exhibits in this case?

A. I didn't sit in on all of this trial, I don't know what all the Exhibits were.

Q. Now, Mr. Patten asked you to compute the gain accruing to Mr. Mattison on this transaction assuming that gain was recognizable upon the sale of assets, did he not?

A. Yes; I believe he mentioned that.

Q. And you gave, as I recall, substantially the same figure for that gain as you did for the gain, recognized gain on the partial liquidation of the corporation, did you not?

A. For the year 1952 it was the same, yes, sir.

Q. Yes, sir. Now, would you please tell me, sir, how you arrived at a figure for basis in your computation of gain in 1952, assuming that Mr. Mattison sold the assets of the corporation, that gain was recognizable?

A. Mr. Mattison paid out—his cost of $4,841 for 25 shares in 1945. He purchased 2,164 shares—he paid out in—for the 2,164—if he bought the assets he paid $1,347,480.57, his expenses were $3,677.07, leaving a total cost and expenses of [162] $1,355,998.89.

Q. And that was the basic figure that you used

(Testimony of W. F. Miller.)

in computing gain, assuming that Mr. Mattison sold the assets?

A. That is right, and he received the net figure, he received $1,689,399.07, and assumed liabilities of $310,234.90, and the net assets of $1,379,275.18—that is what he received, and he paid the figure that I gave before, making a net gain of $23,276.29.

Q. In other words, Mr. Miller, you treated as a basis upon—all my references are to your hypothetical question—assuming gains recognizable on the sale of assets in that hypothetical question, you used as a figure for basing his entire cost on the entire stock, is that not right, sir?

A. That is right, that is what he paid.

Mr. Foye: That is all.

The Witness: He didn't have——

Mr. Foye: No further questions.

The Court: Let him explain.

The Witness: I'd like to explain the last answer. He did not have, that is what he paid. That is what he received, there was—maybe some kind of a possibility that he was going to receive more but if there were a sale of the assets, then certainly, in my opinion there was an excellent chance that there was a sale of the assets, then there was a tremendous gain to the corporation and the [163] taxes would be a lot more and Mr. Mattison had no assurance whatsoever that he was not going to receive anything, that he was going to have a loss.

In addition to that, to assume that he is going to get some other money, that he has from an account-

(Testimony of W. F. Miller.)

ing standpoint, or any other standpoint, particularly from an accounting standpoint and assumed that he was going to get some money that he had no idea he was going to get, to attempt to tax it in this period don't justify, from an accounting standpoint, it don't make sense.

Redirect Examination

By Mr. Patten:

Q. Mr. Miller, is there any accounting principle by which you can compute gain in one year on what might happen in the next year, or does each year have to stand on its own basis?

A. Each year has to stand on its own basis. You can't come along and attempt to put in a lot of money that there is a possibility to get in future years when the possibility is very questionable.

Mr. Patten: That is all, thank you.

(The witness left the stand.)

Mr. Patten: Mr. Dollar, please.

Mr. Foye: Did you subpoena Mr. Dollar?

The Court: He is in the courtroom and may be [164] called.

JOE B. DOLLAR

a witness called on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: Joe B. Dollar.

Mr. Foye: Your Honor, this is the witness that I mentioned this morning. I attempted to subpoena Mr. Dollar yesterday after the Court recessed and found out he was in Sun Valley. I called Mr. Dollar and asked if he would volunteer to come to testify for the Government in this trial and told him we would not subpoena him in Sun Valley. Mr. Dollar has volunteered to come here. I would like to call him as a Government witness before Mr. Patten takes him.

Mr. Patten: Does it make any difference?

The Court: He may be called by the Plaintiff and you may call him as your witness thereafter, if you desire.

Mr. Foye: I will call him as an adverse witness.

Mr. Patten: You may cross-examine him.

The Court: I don't think you may call him as and adverse witness. You may cross-examine him.

Mr. Patten: Mr. Mattison, will you stand, please?

(Mr. Mattison stood in the courtroom.) [165]

(Testimony of Joe B. Dollar.)

Direct Examination

By Mr. Patten:

Q. Mr. Dollar, what is your business?

The Witness: Saving and loan.

Q. And what is your address, sir?

A. 900 Jefferson Street, Boise.

Q. How long have you lived in Boise?

A. About thirty-five years.

Q. Would you look at the gentleman right here, Mr. Mattison (indicating)? Do you know Mr. Mattison? A. I do now, yes.

Mr. Foye: When did you first realize—oh, I thought you were through.

Q. (By Mr. Patten): Have you had any business transactions with Mr. Mattison?

A. I have, yes, sir.

Q. What was this transaction, sir?

A. Golly, I think it was an option of some kind.

Q. Did you buy some stock in the Wescott Oil Company at one time, sir? A. Yes.

Q. How much did you pay for it?

A. Well, I don't know how much I paid a share, that is, I gave them $5,000. [166]

Q. What did you get when you sold it?

A. Around $15,000, as I recall.

Q. Did you sell Mr. Mattison any assets or did you sell him stock?

A. Well, I think I sold him stock.

Q. Have you previously discussed this matter with Mr. Foye?

(Testimony of Joe B. Dollar.)

A. Yes; over the telephone.

Q. Did he call you in Sun Valley?

A. In Sun Valley.

Q. And what did you tell Mr. Foye at the time he phoned you?

A. I told him that I thought I sold the stock to Wescott.

Q. Now, can you explain the mistake you made in talking to Mr. Foye?

A. Well, I naturally thought that the man that came in to see me—and I didn't recall what his name was, I think I told Mr. Foye that I don't know Mr. Mattison, and I didn't until I saw him.

Q. This is the gentleman that came to your office (indicating Mr. Frank Mattison)?

A. That is right.

Mr. Patten: You may inquire. [167]

Cross-Examination

By Mr. Foye:

Q. Mr. Dollar, subsequent to the time you talked to me yesterday, have you had occasion to talk to Mr. Patten or Mr. Mattison this morning?

A. Yes.

Q. When was that? A. This morning.

Q. This morning. Did they call you in Sun Valley? A. Yes.

Q. Did he tell you the occasion for his call, sir?

A. Yes. They didn't call me, Bill Langroise called me, he wanted me to appear here.

(Testimony of Joe B. Dollar.)

Q. And did he ask you if you had ever met Mr. Mattison?

A. Yes; I think he asked me that, too.

Q. And you told him you had not?

A. I told him I didn't think I had.

Q. And what did he say to that?

A. He said, "Would you recall if you saw him?" And I said, "I think probably I would."

Q. You are absolutely certain now, Mr. Dollar, that Mr. Mattison came to you and asked you to sell your stock in the Wescott Oil Company to him?

A. That is right. [168]

Mr. Foye: I have no further questions. That is all, Mr. Dollar.

The Court: That is all, Mr. Dollar.

(The witness left the stand.)

Mr. Patten: The plaintiff rests, your Honor.

Mr. Foye: Did you rest?

Mr. Patten: Yes, sir.

Mr. Foye: The defendant calls Mr. Fred Costello as an adverse witness.

The Court: You better lay a foundation for that first.

Mr. Foye: Yes, sir.

FRED A. COSTELLO

a witness called on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Foye:

Q. Will you state your name, please, sir?

The Witness: F. A. Costello.

Q. And what is your address, sir?

A. 3316 Crescent Rim Drive, Boise.

Q. What is your present occupation?

A. Public Accountant.

Q. And how long have you been so engaged?

A. Around twelve years. [169]

Q. And what did you do prior to that time, Mr. Costello?

A. I was in the Internal Revenue Office.

Q. Here, in Boise?

A. Yes, sir, and other places.

Q. Would you state for the record, please, what your education is in the field of Accounting?

A. Oh, it's mostly from correspondence courses.

Q. Are you a Certified Public Accountant, sir?

A. No, sir.

Q. Are you authorized to practice before the Treasury Department of the United States?

A. No, sir.

Q. Do you hold yourself out as a tax consultant, yourself?

A. I hold myself out—the stationery says, "Tax Accountant."

(Testimony of Fred A. Costello.)

Q. Do you know the plaintiff in this lawsuit, Mr. Frank Mattison? A. Yes, sir.

Q. And how long have you known him?

A. I'd estimate in excess of 20 years, probably 22.

Q. Did you represent Mr. Mattison in this case, now on trial, before the Internal Revenue Service?

A. Well, I participated in a conference with Mr. [170] Miller before the Appellate Staff.

Q. Any other representation?

A. I don't recall. I have been trying to recall whether we had a Ten-Day Conference or not.

Q. Assuming there was an informal conference, would you have represented Mr. Mattison at that conference?

A. I think Mr. Miller and myself would have represented him.

Q. Both of you? A. I think so.

Q. And you represented him before the Appellate Staff?

A. That is right. I was present at the conference.

Q. Do you know Mr. C. J. Wescott?

A. Yes, sir.

Q. Have you ever represented him, sir?

A. No, sir.

Q. Are you familiar with the transaction in question in this case whereby Mr. Mattison purchased the stock of the Wescott Oil Company and liquidated the assets—sold the assets to the Continental Oil Company? A. I think I am.

(Testimony of Fred A. Costello.)

Q. Will you please tell the Court how you first became acquainted with the transaction?

A. Mr. Mattison came to my office—I might add [171] this—when you were in my office a few days ago I said that Mr. Wescott was with him. It is now my best recollection that he was not.

Q. Have you talked to Mr. Patten since you made that recollection? A. Yes, sir.

Mr. Patten: Your Honor, I resent the inferences that I am getting. I——

Mr. Foye: I intend to make no inferences, your Honor, that Mr. Patten has asked the witnesses to change their story. I would like the record to show what the facts are.

The Court: Counsel has a right to talk to the witnesses.

Mr. Foye: I don't——

The Court: He may answer the question, "yes or no," whether he talked to him. I don't know that it is necessary or you are entitled to go into what he said to him.

Mr. Foye: Will the reporter read the question, please?

(The Reporter read the pending question as follows: "Question: Have you talked to Mr. Patten since you made that recollection?")

Mr. Foye: You may answer, "yes or no."

The Witness: I answered that, "yes, sir." [172]

Q. (By Mr. Foye): Mr. Wescott had never come to your office as far as you now can recall?

(Testimony of Fred A. Costello.)

The Witness: Yes, he came to my office after the transaction had been completed and I thought he had been in my office two or three times, and he mentioned to me yesterday that he had been in once.

Q. And that is now the source of your recollection, sir?

A. I think he was in at least twice, that is my recollection.

Q. Do you now recall that he was not in your office prior to the time the transaction was consummated? A. I feel very certain.

Q. Was Mr. Mattison in your office prior to the time the deal was consummated?

A. Yes, sir.

Q. And Mr. Wescott did not come in?

A. I feel quite certain he did not.

Q. Do you recall the purpose Mr. Mattison came to your office, sir?

A. Yes, sir. He wanted tax advice with respect to this proposed transaction that is now before the Court.

Q. Whom did you think you were representing at that time, Mr. Costello? [173]

A. I thought I was representing the Wescott Oil Company.

Q. Why was that?

A. Well, I think I just took it for granted. I thought of Mr. Mattison and the Wescott Oil Company as kind of a unit, I guess.

Q. Did Mr. Mattison ask your tax advice relat-

(Testimony of Fred A. Costello.)

ing to the tax picture of the Wescott Oil Company or his own personal tax?

A. Wescott Oil Company.

Q. He asked you nothing about his own personal taxes? A. Not that I recall, no, sir.

Q. And who paid you for giving that advice?

A. Well, I think I sent—the firm bill went to Wescott Oil Company but Mr. Mattison paid it with his personal check.

Q. And that fee was $750? A. Yes, sir.

Q. Were there any other services rendered for that fee of $750, if you recall?

A. Oh, I think we discussed filing a request for prompt assessment. I gave him the form to fill in for that purpose.

Q. That is the only thing? [174]

A. Yes, sir.

Mr. Foye: That is all.

Mr. Patten: No questions.

The Court: That is all Mr. Costello.

The Witness: Thank you.

Mr. Foye: The defendant calls Mr. Peterson.

The Court: Before you call your next witness we will take the morning recess.

(The Court took a short recess.)

The Court: You may call your next witness.

Mr. Foye: Mr. Peterson, please.

CHARLES O. PETERSON, JR.

a witness called on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: Charles O. Peterson, Jr.

Direct Examination

By Mr. Foye:

Q. Mr. Peterson, where do you live?

A. Boise, Idaho.

Q. What is your occupation, sir?

A. Internal Revenue Agent.

Q. How long have you been an Internal Revenue Agent?

A. Since early in 1951. Prior to that time I was a Deputy Collector. [175]

Q. What year, sir?

A. I started as a Deputy Collector when I got out of the Army in 1945.

Q. What is your education, sir?

A. College graduate.

Q. What college? A. Utah State.

Q. What was your major? A. Accounting.

Q. Are you a Certified Public Accountant?

A. Yes.

Q. In the State of Idaho? A. That's right.

Q. Have you conducted any investigation of the Income Tax liability of Mr. Frank Mattison?

A. Yes.

(Testimony of Charles O. Peterson, Jr.)

Q. In connection with that investigation, have you examined the corporate records of the Wescott Oil Company, or the income tax returns of the Wescott Oil Company and Mr. Mattison for the years of 1952 and 1953? A. Yes.

Q. Have you examined the complete administrative files of the Revenue Service in this case, sir?

A. Yes, I have.

Q. Do you know whether or not that file [176] was prepared in the ordinary course of the Revenue Service administrative procedure?

A. As far as I know, it was.

Q. Do you know what changes were made from the way the taxpayer originally reported the transaction on the return and the assessment that was made against him for the additional tax?

A. The Government's position, as set forth in the Statutory Notice, is based on—oh—is that Mr. Mattison acquired the stock of Wescott Oil Company for the purpose of selling the operating assets to Continental Oil Company, therefore, the gain is attributable to and the result of the sale of these assets and the gain is measured by the difference between the sale price of the assets and the cost of the assets which were sold to Continental in 1952.

The cost of the assets is based upon the cost of the stock which he acquired for the purpose of acquiring these assets, less the portion of the cost which is applicable to the assets which were retained by the corporation and were not sold. The gain is short

(Testimony of Charles O. Peterson, Jr.)
term capital gain, of course, since the assets were bought and sold simultaneously.

Q. On which year? A. In 1952.

Q. Did the Revenue Service tax, in their deficiency [177] notice, sir, any gain that was not received in 1952? A. Not—not to my knowledge.

Q. Have you examined their computations upon which the assessment was based, sir?

A. Yes, I have.

Q. Do those computations disclose that any gain was taxed in 1952 that was not received in 1952?

A. No.

Q. Now, did the Revenue Service make any change in the assessment from the way the taxpayer reported the transaction, as far as liabilities assumed were concerned?

A. The taxpayer treated the liabilities which he assumed in this transaction as a part of basis. In the Statutory Notice of deficiency these liabilities are treated as reduction of proceeds.

Q. Mr. Peterson, were you the original examining agent in this case, sir? A. Yes, I was.

Q. Subsequent to the time that you made your report, can you tell us what happened then?

A. The taxpayer did not agree to my findings and appealed to the Appellate Staff.

Q. Do you know whether or not the Appellate Staff agreed with your legal theory of this case?

A. They used a different theory in the [178] matter. The gain is substantially the same in my computations and the computations of the Appellate

(Testimony of Charles O. Peterson, Jr.)

Staff set forth in the statutory notices. My position was that the gain on the transaction was realized on the liquidation of the corporation, whereas the position set forth on the statutory notice was that the gain was realized upon the sale of assets.

Q. Did they change their primary reliance of the legal theory from the basic theory that you primarily relied on?

A. They discussed my position as an alternative. Is that what you mean? I don't——

Q. Yes, sir. What legal theory did they base their primary reliance upon?

A. Upon the theory that the gain was attributable to the sale of assets.

Q. Did they agree substantially with your tax effect of this transaction, outside of changing your legal theory?

A. Substantially the same. There was an increase, a net increase in tax for the two years in the approximate amount of $2,000, which I think is largely due to the treatment of the liabilities which Mr. Mattison assumed.

Q. How did the Appellate Staff treat the liabilities?

A. They treated those liabilities as a [179] reduction of proceeds, where I had treated them as a part of basis, which was the same way the taxpayer reported them.

Q. Now, Mr. Peterson—could I have this marked for identification, please?

(Testimony of Charles O. Peterson, Jr.)

The Clerk: Being marked as Defendant's Exhibit No. 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Foye): I hand you this document, marked as Defendant's Exhibit No. 1 for Identification, and ask you, please, what that is?

The Witness: It's a part of the Appellate Staff's narrative report in their conference with the taxpayer.

Q. Do you know the purpose for which that computation contained there was made?

A. For the purpose of instructing the auditor who writes the statutory notice. The purpose of giving him the figures on which to base the statutory notice.

Q. Do you know whether or not the statutory notice of the assessment at issue here was based on those figures? A. Yes, it was.

Q. It was? [180] A. Yes.

Q. Mr. Peterson, who was the representative of the Internal Revenue Service at the Appellate hearing in this case, if you know?

A. Ralph Lindberg.

Q. Do you know whether or not he is still with the Revenue Service?

A. He has resigned.

Q. Do you know where he has gone?

A. California.

(Testimony of Charles O. Peterson, Jr.)

Mr. Foye: I will offer Defendant's Exhibit No. 1 for Identification in evidence.

Mr. Patten: May I ask Mr. Peterson a few questions?

The Court: Yes, you may.

Voir Dire Examination

By Mr. Patten:

Q. Mr. Peterson, was this document prepared by you, sir?

The Witness: This one I'm looking at?

Q. Yes, sir. A. No, sir.

Q. How do you know—and do you know who prepared it?

A. It's in the—it's a part of the appellate report.

Q. Was this part of the information which [181] was furnished the taxpayer, or was that part of the confidential file of the Internal Revenue Service? A. It was not furnished to the taxpayer.

Q. Do you recall, on my taking your deposition on September 5, 1957—— A. Yes.

Q. Do you recall my asking for your computations on that date? A. Yes.

Q. Do you recall refusing on the ground these were confidential and privileged communications?

A. Well, I didn't refuse.

Q. You recall that they were refused?

A. Yes, sir.

Mr. Patten: I object to the documents on the grounds that this witness did not prepare it and

(Testimony of Charles O. Peterson, Jr.)

there is nothing here to connect it and it's confidential, and the Government can either keep it confidential or they bring it out openly in court, hence keep veiled the secrecy and keep state secrets around it and then flash it in the court room when you don't have an adequate opportunity to either examine the document or the man who prepared it, your Honor.

Mr. Foye: Your Honor, this has been prepared, as Mr. Peterson testified, in the ordinary course of the [182] Revenue Service procedure.

The Court: I know that, I heard him testify. The question that remains here, as far as the Court is concerned is the final conclusion reached by the Appellate Staff, as a result of that they assessed this additional tax. The question is whether it was justifiable by virtue of this letter or whether it was the computation they made. Whether these figures are correct, there isn't anybody here to be cross-examined on these figures. He did not prepare them, he knows nothing about them. The objection will be sustained.

Direct Examination
(Continued)

By Mr. Foye:

Q. Mr. Peterson, can you, sir, prepare, of your own knowledge, a computation showing how the tax assessed in this case was based?

The Witness: Well, yes, I could reconstruct it, I think. It will take quite a little time.

Q. Can you make the computation here, sir?

(Testimony of Charles O. Peterson, Jr.)

A. Without the assistance of this schedule, here, it would probably take a little time to do it.

Mr. Foye: May I have this marked for identification, please?

Mr. Patten: It would be helpful if he would do it on the blackboard. [183]

Mr. Foye: Be glad for him to. Do it on the blackboard. Will that be all right with you, Mr. Peterson?

A. Yes, with the aid of this schedule?

Mr. Foye: Pardon me?

The Witness: With the aid of the schedule?

Mr. Patten: No, sir. You may use the Exhibit.

Mr. Foye: The Court will have to answer that question.

The Court: That is right. You cannot copy those figures, that is not in evidence. You will have to compute the tax as finally computed by something from the Exhibits.

Q. (By Mr. Foye): Mr. Peterson, would you please, it isn't necessary, Mr. Peterson, that you have the precise figures. I would like for you to explain to the Court, please, using rounded off figures the theory upon which the Internal Revenue Service assessed the tax at issue.

The Witness: I don't know whether I can. Can I use my prior report? I prepared that.

Q. Certainly.

(The witness left the stand and went to the blackboard.)

(Testimony of Charles O. Peterson, Jr.)

A. (Writing): "Proceeds $1,400,000.

Q. That is the proceeds from the sale of the assets, sir? [184]

A. Subsequent check. (Writing.) "Subsequent check."

Q. That was from the Continental Oil Company?

A. Yes. (Writing.) "289,399.07." Subtracting results of 1-6-8-9-3-9-9-point-0-7.

Q. That is the computation of the basis on which the tax was assessed, is that right?

A. That's right. (Writing.) "$1,689,399.07." "Less liabilities assumed $310,000." With a result of $1,389,399.07. (Writing.) "$1,389,399.07." "Cost of stock: Documentary Stamps $129.84. Paid to shareholders $1,134,870.16."

Final payment to C. J. Wescott, that last figure is the amount distributed by the bank.

Q. To the stockholders?

A. Yes. (Writing.) "Final Pmt $212,610.41" Result of $1,347,610.41 less. (Writing.) "Less costs applicable to assets not sold: Cash $101,585.76." That is cash in the amount of 1-0-1-5-8-5-7-6. (Writing.) "Lilly Seed Co. $1,000.00. $102,585.76."

Q. Do you know whether or not that was the amount of cash distributed to Mr. Mattison in 1953?

A. Yes, that is the final figure on the stock of the Lilly Seed Company Stock. Now, on this cash, Mr. Mattison owned 25 shares for several years prior to this [185] transaction.

Q. How did the Revenue Service treat that 25

(Testimony of Charles O. Peterson, Jr.)

shares? A. As a long term capital gain.

Q. On the 25 shares of the liquidation?

A. Yes, that's right. Now, then, a portion of this cash is applicable to the 25 shares and the portion would be twenty-five over twenty-one-eighty-nine. (Writing.)

Q. What does that say?

A. Less the portion applicable to the 25 shares. (Writing.) "$1,000." Do I need to do the arithmetic or could I just add the $1,000?

Mr. Patten: Go ahead, you do not need to make a break down between the 25 shares.

Q. (By Mr. Foye): Just show how the gain was arrived at.

A. I can't tell without writing. I would guess at a thousand dollars.

Mr. Foye: That would be satisfactory if you guess at that. Unless you want him to compute the fraction.

Mr. Patten: No.

The Witness (Writing): "$1,246,024.65."

Q. (By Mr. Foye: And what is that figure, sir?

The Witness: $1,246,024.65 which would be [186] the cost of the assets which were sold to Continental in 1952, and I take it from the total of $1,389,399.07 and that should be the gain on the sale of the assets. Now, there were some expenses of the sale. There is no argument on that.

Q. That $1,246,024.07, you had to guess at the figure—you had to guess at the 25 shares—was the basis that the Revenue Service used for the assets

(Testimony of Charles O. Peterson, Jr.)

sold in 1952, was it? A. That's right.

Mr. Foye: That is all, Mr. Peterson.

Mr. Patten: May I inquire?

Mr. Foye: Certainly.

The Court: Resume the stand please, Mr. Peterson.

(The witness resumed the stand.)

Cross-Examination

By Mr. Patten:

Q. Now, Mr. Peterson, those are the key figures to the computation. This $102,585.76, those are the key figures to the computation. If we eliminate these two figures your answers would come out substantially as reported on the taxpayer's return, is that not right, sir?

The Witness: Well, I think so, yes.

Q. If we take these figures out—the cash is 1-0-1-5-8-5-7-6, and the $1,000 Lilly Seed Stock, our [187] figures would be approximately what was reported on the taxpayer's return?

Mr. Foye: Will you specify where you are taking out of, sir?

Mr. Patten: Taking away from basis.

Mr. Foye: Yes, sir.

Mr. Patten: Is that right, sir?

The Witness: I think so.

Q. (By Mr. Patten): Now, your computation would be exactly the same if you put these figures in receipts, or whether you took them out of basis,

(Testimony of Charles O. Peterson, Jr.)

your end figure would come out the same, wouldn't it? A. Oh, yes.

Q. Now, sir, do you recall when Mr. Mattison received the $101,585.76?

A. Well, received—well—that—that figure is the figure that was disbursed to him from the corporation in 1953.

Mr. Patten: May I have Exhibit N and Exhibit Q?

Q. (By Mr. Patten): I am handing you Exhibit N, sir, and calling your attention to the third check there, what is the amount of that check, sir?

The Witness: $101,585.76. [188]

Q. And what is the date of that check, sir?

A. May 12, 1953.

Q. Handing you Exhibit Q, and I ask you if you know what that is?

A. That is a deposit ticket, here, on the First Security Bank of Idaho, Frank Mattison, Special Account, a deposit in the amount of $1,000, and it's labeled Lilly.

Q. What is the date of that deposit?

A. May 13, 1955.

Q. Now, isn't it a fundamental basis of taxation that the tax for each year crystalizes at the close of that year? A. Yes.

Q. And that nothing which happens, with a few minor exceptions—technical exceptions, that happen after that can effect the tax for the year which is closed?

A. Generally speaking, that is correct.

(Testimony of Charles O. Peterson, Jr.)

Q. That is correct. Will you explain to us on what basis you determined this transaction for 1952, transactions which occurred in 1953 are based?

A. That computation is to arrive at the gain on the assets which Mr. Mattison sold and, of course, obviously, he didn't sell the cash.

Q. I am afraid I can't understand you, sir. How did you get this figure, was it the bank balance at the [189] end of 1952 or how? This figure was not determined until 1953, was it?

A. That is right—I mean that is the figure that——

Q. Could that figure have been computed in 1952?

Mr. Foye: I will object on the ground that there is no proper foundation laid. I don't think it was gone into and it would be a conclusion of the witness on that.

The Court: If he does not know, he can say so.

The Witness: Well, they could have computed a cash balance which, in all probability, would not have been that figure.

Q. (By Mr. Patten): Can you explain me, in any way that it is possible, that before midnight of December 31, 1952, that the taxpayer could have computed this figure and he could have used it in his return?

The Witness: I think he could have, substantially, because—testimony——

Q. Would you do that for us, sir?

A. Well, it is, as I recall from the testimony——

(Testimony of Charles O. Peterson, Jr.)

Q. Would you do that for us?

A. There were only very few checks written in 1953, the major part of the difference—Mr. Mattison testified this morning—the major part of the difference between the cash balance at the end of 1952 and the figure of [190] 1-0-1-5-8-5-7-6 was the Federal and the State Income Tax which could have been computed at that point.

Q. Would you show me the method by which Mr. Mattison could have computed and obtained that figure? Is this figure based upon facts which occurred in 1952 or 1953?

Mr. Foye: Your Honor, we will stipulate that the figure could not have been computed until 1953.

The Court: Very well.

Q. (By Mr. Patten): And so the taxpayer could not have prepared computations such as you have at the time his returns were prepared?

The Witness: I think he could, within a matter of a few hundred dollars because the major part of the disbursements out of the cash account after December 31, 1952, was for tax liability which could have been determined, which were determinable at that point.

Q. Is this computation based on occurrences in 1953 or occurrences in 1952, sir?

A. Well, there is no argument about, it's necessary for the corporation in business to accrue liabilities when they are accruable. That is correct.

Q. Will you answer my statement of whether this is based on facts which occurred and were com-

(Testimony of Charles O. Peterson, Jr.)

pleted in 1952, or [191] is it based on hind-sight as to what happened in '53?

A. I think definitely it is on occurrences in 1952.

Q. Will you show me how, in 1952, the taxpayer could have computed or estimated or anticipated that figure? Will you go to the board, please, sir?

A. (Witness at the blackboard): On cash basis December 31, 1952, as shown by the corporation records of which I have a portion of the cash account was $127,977.83. (Figure written on the board.) Now, I'll subtract the amount of the Federal and State Income tax, when I find the figure, the balance sheet as shown on the corporation return for the Wescott Oil Company shows Federal Income Tax in the amount of $23,822.44, and Idaho State Income Tax——

Q. Will you put the figures down please?

A. (Writing): Do you want to see me subtract them?

Q. Yes, please, sir.

A. The result is $101,599.61. (Figure written on the blackboard.)

Q. Now, were these figures 1952 figures, or the figures finally used on the return you said they were accruing?

A. I think so. [192]

Q. Now, this computation is based on the assumption that it was a sale of assets, is that right?

A. That's correct.

Q. Now, could you tell us whether these assumed

(Testimony of Charles O. Peterson, Jr.)
liabilities of income tax was based on the theory that it was a sale of assets or a sale of stock?

A. Well, of course, those liabilities are corporation liabilities. This question you asked in regard to the sale of assets, that relates to the individual, doesn't it?

Q. Now, if there had been a sale of assets, what would the corporation liabilities have been?

A. I have not figured it.

Q. It would be substantially in excess of $200,000, wouldn't it? A. I have no idea.

Q. Can you compute it from the corporation tax return, what the liability would have been if it had sold its assets, what its tax would have been? You have the basis.

Mr. Foye: You are assuming the sale for the same price?

Mr. Patten: Yes, for the same price. Just give me a rough figure.

The Witness: I'm still looking for a balance sheet—oh, here—no, that's not it. [193]

Q. (By Mr. Patten): There is one in there. What were the book value of the assets of the corporation?

A. That is what I don't know. That is what I'm trying to find out.

Q. I think they are in there. There it is, sir.

A. Oh, let's see.

Q. Can you tell us what the book value of the corporation's assets were in 1952?

A. There is a schedule of assets here on the re-

(Testimony of Charles O. Peterson, Jr.)

turn distributed by the Wescott Company to Frank Mattison which shows a final figure of seven hundred eight thousand 4-8-5-8-5, total assets of $1,018,-485.85, less liabilities of $310,000. I suppose those are the figures, I don't know.

The Court: Mr. Patten, I assume you have a purpose for asking this question, but at the moment I cannot see any reason.

Mr. Patten: Yes, sir. I am coming to it, sir.

The Court: Very well.

Q. (By Mr. Patten): Isn't it true, sir, that you have computed the receipts here on the assumption that this is a sale of assets, and your liabilities on the assumption that it was a sale of stock, and if you use the same assumption all the [194] way through it was a sale of assets. Instead of realizing a gain in the year 1952, Mr. Mattison would have realized a loss of approximately $100,000?

The Witness: Did you ask me the question?

Q. Yes, sir.

A. I don't think you are correct in your statement.

Q. If the corporation had sold its assets, what would have been its tax liability?

A. Well, it would, the proceeds as shown there, less the basis, I can't tell from what the figures I have here, just what the basis would be.

Mr. Foye: Your Honor, there is no disputing that the form of the transaction was the sale of stock and the liquidation of the corporation. Our position is that the form is not controlling, that the law is that

(Testimony of Charles O. Peterson, Jr.)
in this type of situation this was but a unified transaction constituting the sale of assets, therefore it was necessary to deduct from cash received the accrued income for State and Federal Income Taxes for 1952.

Mr. Patten: My position is, if we proceed, we proceed on the assumption that it is a sale of assets, you have got to follow that assumption all of the way through consistently in computing the liabilities of the corporation, and this, if it is done, and the assumption, you can't change the basis on the assumption. You can't make one part [195] of a computation on one assumption and another part of it on another assumption.

Mr. Foye: The liabilities of the corporation are not at issue in this case, your Honor.

Mr. Patten: They certainly are.

The Court: I don't know whether this young man is in a position to determine the tax of a corporation offhand. If he can estimate what the tax would be, whatever your purpose, he may answer.

Q. Using the basis shown in the return and the actual sales price here.

The Witness: Assuming this is the basis of $708,-485.85, that would leave you a profit in round figures of $600,000.

Q. And what would the tax be on about $600,000 using the alternate?

A. It would be either 25 or 26 per cent, I can't remember which.

Q. And that would be over $100,000, would it not?

(Testimony of Charles O. Peterson, Jr.)

A. Yes.

Q. And if you use these figures down here, there would be no cash left, would there? The taxes would take up all the cash.

Mr. Foye: What figures are you talking [196] about?

Mr. Patten: If we substituted about $1,000 and subtracted it from the cash balance here, there would be no assets.

Mr. Foye: Mr. Peterson, this figure of $23,-822.44, and the figure that you have placed on the blackboard directly below it of $2,595.78, are they income taxes paid by the corporation for the year 1952?

The Witness: As far as I know, they are, yes.

Mr. Foye: Are those taxes accrued on the corporation balance sheet in exactly those figures, as of December 31, 1952?

The Witness: Yes, they were.

Mr. Foye: That is all.

Mr. Patten: Those returns were filed in '53, were they not?

The Witness: That is correct.

Mr. Patten: I have no further questions of this witness.

(The witness left the stand.)

Mr. Foye: The defendant calls Mr. Eberle.

W. D. EBERLE

a witness called on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please?

The Witness: W. D. Eberle. [197]

Q. (By Mr. Foye): What is your address, Mr. Eberle? A. 1211 Happy Drive.

Q. Boise? A. Boise, Idaho.

Q. And what is your occupation?

A. I am an attorney.

Q. Do you have any connection with the Pioneer Company, Mr. Eberle?

A. Pioneer Company is a co-partnership of which I am one of the partners.

Q. Are you in charge of the assets of that company, Mr. Eberle? A. Yes, I am.

Q. Were you in charge of the assets of that company in 1952? A. Yes, sir.

Q. Did the Pioneer Company, in 1952, own any stock of the Wescott Oil Company, sir?

A. Yes, sir.

Q. And were you in charge of the disposition of that stock at that time?

A. To the best of my knowledge, yes.

Q. What is your father's name? [198]

A. J. L. Eberle.

Q. Did he ever own any stock in the Wescott Oil Company that you know of?

A. At one time, yes.

(Testimony of W. D. Eberle.)

Q. Do you know what was done with that stock?

A. Yes, it went to Pioneer Company.

Q. That was prior to 1952? A. Yes.

Q. Do you recall when the Pioneer Company sold the stock in the Wescott Oil Company?

A. It was sometime in 1952, to the best of my recollection.

Q. Have you made a search for any papers that you might have in regard to the sale?

A. Yes, I searched this morning to determine if I had any papers and I was unable to find any of them.

Q. I see. What is your recollection, sir, as to how that sale came about?

A. To the best of my knowledge, I have a recollection of receiving some form of letter or information advising of a sale—possible sale of the stock and the money was in escrow at the First Security Bank.

Q. Do you recall from whom that letter was received?

A. No, I don't. I was sure that I could find it but I was unable to do so. [199]

Q. Do you know Mr. Frank Mattison?

A. No; I do not.

Q. Have you ever met Frank Mattison?

A. No; not to the best of my knowledge.

Q. Do you know whether or not Mr. Mattison contacted you on the sale of the stock?

A. To the best of my knowledge he did not.

Mr. Foye: Will Mr. Mattison stand up, please?

(Testimony of W. D. Eberle.)

Q. (By Mr. Foye): Have you ever seen that man before? (Indicating.)

A. Not to my knowledge, although if he has been in Boise I have seen him. I don't know him.

Q. Do you know whether or not Mr. Mattison ever contacted your father regarding the stock?

A. To the best of my knowledge he did not.

Q. Would your father normally have had any control of the stock owned by the Pioneer Company? A. He did not.

Mr. Foye: You may cross-examine.

Cross-Examination

By Mr. Patten:

Q. What is the Pioneer Company?

A. It's a co-partnership consisting of myself, my brother, and my sister.

Q. And the senior Mr. Eberle is your [200] father? A. He is my father.

Q. Handing you a document, a portion of Plaintiff's Exhibit H, and turning to the second page thereof, is that your signature, sir?

A. That is my signature.

Q. And with whom is that option agreement?

A. This instrument speaks for itself. It is the Pioneer Company and Frank Mattison.

Q. Do you recall the circumstances under which you signed that?

A. To the best of my knowledge this was handed to me, as I remember, by the First Security Bank.

(Testimony of W. D. Eberle.)

Q. How long ago did this transaction occur, sir?

A. Some time—five years ago.

Mr. Patten: No further questions.

Redirect Examination

By Mr. Foye:

Q. Mr. Eberle, do you recall whether or not Mr. Wescott ever contacted you in regard to the sale of this stock? A. I am sure he did not.

Mr. Foye: That is all, thank you, very much, Mr. Eberle.

(The witness left the stand.)

Mr. Foye: Defendant rests, your Honor. [201]

Mr. Patten: Plaintiff has no rebuttal.

The Court: Is it the desire of counsel to argue this matter orally?

Mr. Foye: Speaking for myself, sir, I would prefer to submit the matter on brief.

Mr. Patten: I would like to do what is best for the Court.

The Court: The Court will take this matter under advisement. How long does the plaintiff desire to file the brief? In the pretrial brief you cited ample authority for your position and I assume that your briefs would be analyzing what you think the facts are and the theory of the case.

Mr. Patten: As Mr. Foye said, we are anxious to be helpful to the Court and if the Court would tell us any particular points on which he would like further briefing we will be glad to do that.

The Court: As far as I am concerned, if both of you think you have set forth your position I will take the matter under advisement. The only thing that occurs to me is that you might be helpful in setting out your theory in view of the facts as you think they appear from the record.

Mr. Foye: I would like an opportunity to do that, your Honor, and I would like an opportunity to reply to Mr. Patten's legal position. [202]

The Court: You should set forth your position in the brief from a legal standpoint.

Mr. Patten: Your Honor, you get tired of hearing this, but I am starting another trial and would like at least 30 days to file my brief, if the Court will grant that.

The Court: You may have 30 days.

Mr. Foye: I would like 30 days.

The Court: You may have 30 days for filing your answering brief, and how long for the reply brief, Mr. Patten?

Mr. Patten: Ten days.

Mr. Foye: I would like to have a transcript of the evidence.

The Court: Let us put it this way, you will have 30 days from the receipt of the transcript.

The Court is adjourned, subject to call.

(The Court adjourned at 12:15 o'clock p.m.) [203]

State of Idaho,
County of Ada—ss.

I, Edward F. Seymour, hereby certify that I am an Official Reporter for the United States District Court for the District of Idaho;

I further certify that I took the proceedings in the above-entitled cause in Stenotypy and thereafter reduced the same into typewriting and I further certify that the foregoing pages, 1 to 203, both inclusive, is a true and correct transcript of the proceedings had in and about said hearing on the dates mentioned therein.

In Witness Whereof I have hereunto set my hand this 9th day of October, 1957.

/s/ EDWARD F. SEYMOUR,
Official Reporter.

[Endorsed]: Filed October 10, 1957. [204]

DOCKET ENTRIES

1957

Feb. 8—File Complaint.
Feb. 8—Issue Summons.
Feb. 13—File Summons—served Feb. 11, 1957.
Apr. 10—File Motion & Order—May 15, 1957, for Deft. to Answer (Judge Taylor).
Apr. 12—File Answer.
Apr. 12—File Certificate of Service.

1957

July 1—Filed Notice to Take Deposition of Frank N. Mattison and C. J. Wescott.

July 2—Filed Motion to vacate taking Depositions of Frank N. Mattison & C. J. Wescott.

July 3—Filed Order Vacating Taking Depositions of Frank N. Mattison & C. J. Wescott (FMT).

Aug. 15—Filed Notice to take Deposition of Frank N. Mattison & C. J. Wescott.

Sept. 5—Record of pretrial hearing-stipulation of facts to be submitted.

Sept. 7—Filed deposition of Frank N. Mattison & C. J. Wescott.

Sept. 9—Filed motion for leave to amend answer.

Sept. 9—Filed pretrial brief of deft.

Sept. 9—Filed deposition of Charles Peterson.

Sept. 9—Filed deposition of John W. Hartigan.

Sept. 10—Enter order allowing amendment to answer.

Sept. 10—Filed amendment to answer.

Sept. 10—Record of court trial.

Sept. 10—Filed stipulation re documents.

Sept. 10—Filed reply to counterclaim.

Sept. 11—Record of court trial, taken under advisements, 30-30-10 for briefs.

Oct. 10—Filed reporter's transcript.

Nov. 7—Filed Order: 12/11/57 for Plaintiffs to file Brief (FMT).

Dec. 9—Filed plaintiffs brief.

1958

Jan. 8—Filed motion & Order, Feb. 8, 1958, for deft's. brief (FMT).

Feb. 10—Filed brief for the defendant.

Feb. 17—Filed stipulation & order for extension of time to file plaintiff's brief, March 24, 1958 (FMT).

Mar. 10—Filed reply brief of plaintiffs.

July 2—Filed memorandum opinion (FMT).

July 24—Lodged findings of fact and conclusions of law.

July 24—Lodged judgment.

July 24—Filed acknowledgment of service.

July 29—Filed findings of fact and conclusions of law.

July 29—Filed judgment for plaintiffs for $53,-461.89 plus interest (FMT).

Aug. 29—Filed notice of appeal. Copy to Woolvin Patten & Langroise & Sullivan.

Aug. 29—Filed affidavit of mailing.

Sept. 26—Filed notice of appeal.

Sept. 26—Copies of notice of appeal to Langroise & Sullivan & Woolven Patten.

Oct. 6—Filed withdrawal of notice of appeal, filed Aug. 29, 1958.

Oct. 31—Filed motion and order extending time to Nov. 27, 1958, to file record on appeal.

Nov. 19—Filed designation of contents of record on appeal.

Nov. 19—Filed certificate of service of designation by mail.

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint.
2. Answer.
3. Amendment to Answer.
4. Stipulation (Exhibits A through Q, listed in stipulation, admitted at the trial and included with other exhibits).
5. Reply to Counterclaim.
6. Reporter's Transcript of Proceedings.
7. Memorandum Opinion.
8. Findings of Fact and Conclusions of Law.
9. Judgment.
10. Notice of Appeal filed September 26, 1958.
11. Designation of Contents of Record on Appeal.
12. Copy of docket entries.
13. Minutes of the court of Sept. 10, 1957, and Sept. 11, 1957.
14. Motion and order extending time for filing record on appeal.

15. Exhibits A to Z, inclusive, AA, and Defendant's No. 1.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court, this 20th day of November, 1958.

[Seal] ED M. BRYAN,
Clerk;

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 16257. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frank N. Mattison and Ida G. Mattison, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed and Docketed: November 22, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16,257

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANK N. MATTISON and IDA G. MATTISON,
Appellees.

APPELLANT'S STATEMENT OF POINTS

Pursuant to Rule 17.6 of the Rules of this Court, appellant hereby states that it intends to rely upon the following points on this appeal:

1. The District Court erred as a matter of law in failing to apply to the facts of record in this case the well-established rule that, for federal income tax purposes, the component steps of a single transaction will not be treated separately if in intent, purpose and result it is a single transaction.

2. The District Court erred as a matter of law in failing to hold, on the facts of record in this case, that taxpayer Frank N. Mattison's acquisition of all of the stock of the Wescott Oil Company and the subsequent liquidation of that company were component steps in an integrated series of transactions which, for tax purposes, must be viewed collectively as constituting the purchase of Wescott's assets by taxpayer Frank N. Mattison.

3. The District Court's opinion and judgment are not supported by, but are contrary to, the facts as they were revealed by the pleadings and trial of this cause.

4. The District Court's opinion and judgment are contrary to law.

/s/ CHARLES K. RICE,
Attorney for Appellant.

[Endorsed]: Filed December 8, 1958.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by counsel for the respective parties, subject to the approval of the Court, that the exhibits in the record on appeal, to wit, Plaintiff's Exhibits A through A-A, and Defendant's Exhibit 1, need not be printed and may be considered for all purposes as a part of the printed record herein, so that counsel may refer to them on brief and in oral argument; and that counsel may, if they so desire, reproduce in whole or in part in appendices to their respective briefs any of the exhibits to which reference is made.

/s/ CHARLES K. RICE,
Attorney for Appellant.

/s/ WOOLVIN PATTEN,
Attorney for Appellee.

[Endorsed]: Filed December 23, 1958.

No. 16257

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK N. MATTISON and IDA G. MATTISON, APPELLEES

On Appeal from the Judgment of the United States District Court for the District of Idaho

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BRIEF FOR THE APPELLANT

CHARLES K. RICE,
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S. DEE HANSON,
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BEN PETERSON,
United States Attorney.

KENNETH G. BERGQUIST,
Assistant United States Attorney.

INDEX

CITATIONS

In the United States Court of Appeals for the Ninth Circuit

No. 16257

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK N. MATTISON and IDA G. MATTISON, APPELLEES

On Appeal from the Judgment of the United States District Court for the District of Idaho

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BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the District Court (R. 21-31) is reported at 163 F. Supp. 754.

JURISDICTION

This appeal involves federal income taxes for the year 1952. The taxes in dispute were paid on July 2, 1956. (R. 41.) Claim for refund was filed on July 10, 1956 (R. 9-10), and no action thereon was taken by the Commissioner (R. 5, 14). On February 8, 1957, within the time provided in Section

3772 of the Internal Revenue Code of 1939, the taxpayers brought an action in the District Court for recovery of the taxes paid. (R. 3-12, 219.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment of the District Court was entered on July 29, 1958. (R. 48-49.) Within sixty days and on September 26, 1958, a notice of appeal was filed. (R. 49-50.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court erred in failing to hold that, on the undisputed facts of the case, tax consequences must be resolved in the light of the established rule that a purchase of corporate stock for the purpose of acquiring the corporate assets through liquidation of the corporation is to be treated as a purchase of the corporate assets, rather than of the corporate stock.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 115. DISTRIBUTIONS BY CORPORATIONS.
>
> * * * *
>
> (c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. * * *
>
> * * * *
>
> (26 U.S.C. 1952 ed., Sec. 115.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

* * * *

(4) [as amended by Sec. 150 (a) (1) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The taxpayers, husband and wife, who filed joint returns on the cash basis for the calendar years 1952 and 1953 (R. 32), brought this suit to recover $53,461.89 in income taxes (including interest) which they had paid for the calendar year 1952 pursuant to a net deficiency determination for 1952 based on the ground that certain transactions should be treated according to their substance as a purchase of corporate assets, rather than of corporate stock, and therefore as resulting in *short*-term capital gain in 195*2*, rather than in long-term capital gain in 195*3*.[1] The District Court entered judgment in favor of the taxpayers. (R. 48-49.)

The facts as found by the District Court (R. 32-45) may be summarized as follows:

Wescott Oil Company was incorporated in 1920 under the laws of Idaho and thereafter for more

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[1] The deficiency for 1952 is a *net* deficiency, as already noted, in the amount of $43,397.81, which is the difference between the additional taxes determined for 1952 and the overpayment determined for 1953. (See R. 41.)

than thirty years engaged in the business of selling gasoline and related petroleum products in Idaho and Oregon. The corporation was wholly owned by the Continental Oil Company until 1926, in which year C. J. Wescott acquired 20% of its stock and became president of the Company, which position he held until its dissolution in June, 1953. In 1945 Continental sold its stock in Wescott Oil to Mr. Wescott who in turn resold a considerable amount thereof to friends and associates at the same price he paid Continental therefor. At that time the taxpayer (Mr. Mattison), who has been secretary-treasurer of Wescott Oil from 1929 to 1952, acquired 25 shares of stock of Wescott Oil. (R. 33.)

During the considerable number of years that Wescott Oil was in existence, its name was well known in Idaho and parts of Oregon and it was a very successful venture earning sizable profits and paying dividends. (R. 33.)

In about 1950, Mr. Wescott and the other stockholders—for business reasons not particularly important here—resolved to dispose of their shares of stock in Wescott Oil provided a satisfactory price could be obtained therefor. Mr. Wescott, in behalf of himself and the other stockholders, undertook to find a buyer for these shares. (R. 34.)

In 1951 Mr. Wescott entered into negotiations with Continental for the sale of the stock of Wescott Oil. For a while it looked as though the negotiations would be successful, but they failed because Continental was unwilling to pay the price of $607.63 a share demanded by the stockholders for their stock (a price deemed necessary to net the stockholders

$500 a share after paying taxes on their capital gains). (R. 34-35.)

The taxpayer, having been present at some of the negotiations with Continental and being aware that the negotiations had failed, in April of 1952 approached Mr. Wescott in regard to purchasing the stock of Wescott Oil at the same price Mr. Wescott had been asking for it from Continental. Mr. Wescott and the taxpayer orally agreed that the taxpayer could acquire the shares at the same price they had been offered to other prospective purchasers. (R. 35-36.)

Immediately after receiving this oral assurance from Mr. Wescott, the taxpayer began negotiations for the sale of the operating assets of Wescott Oil to Continental, if and when he acquired them. After some negotiations, Continental on May 12, 1952, executed a binding offer in favor of the taxpayer, good for thirty days, to purchase the operating assets of Wescott Oil for $1,000,000, plus inventory. After obtaining this purchase agreement, the taxpayer approached other stockholders of Wescott Oil and obtained written options to purchase their shares in the corporation. During the remainder of May 1952 the taxpayer obtained options from the sixteen stockholders of the corporation other than Mr. Wescott and himself. These options were exercised in writing on or about May 30, 1952, and pursuant to the terms thereof the other stockholders of Wescott Oil deposited their shares with the First Security Bank of Idaho (hereafter called the Bank) as escrow holder. (R. 36.)

On June 10, 1952, all of the outstanding stock of the Wescott Oil Company, except the shares owned by the taxpayer, had been deposited with the Bank. As permitted under the escrow instructions, Wescott Oil issued a new certificate of stock on June 10, 1952, in the name of the taxpayer, Frank N. Mattison, for the total of 2,189 shares. This new certificate represented all the stock which the taxpayer had contracted to purchase from the other stockholders as well as the 25 shares which he had purchased in 1945, and constituted all the outstanding stock of Wescott Oil. (R. 36-37.)

On June 13, 1952, the taxpayer, being the sole stockholder of Wescott Oil, called a special meeting of the stockholders at which it was resolved that the business of the corporation be discontinued and that the officers and directors proceed to wind up its business affairs, transfer its assets to the taxpayer, the sole stockholder, and dissolve the corporation. Immediately following the stockholders' meeting, a special meeting of the directors of Wescott Oil was held at which time the taxpayer resigned as secretary-treasurer of the Company and the directors resolved that the operating assets of Wescott Oil should be conveyed to the taxpayer by way of a partial distribution in liquidation. Accordingly, on June 16, 1952, Wescott Oil conveyed its operating assets to the taxpayer, who in turn reconveyed such assets to a wholly-owned subsidiary of Continental. (R. 37.)

As partial consideration for the conveyance of these assets, Continental on the same date, June 16, 1952, issued a check to the taxpayer for $1,400,000,

which he endorsed over to the Bank. The proceeds of this check were applied as follows: $265,000 paid on the obligation of the Company to the Bank which had been personally assumed by the taxpayer, and $1,135,000 paid out to the selling stockholders under the escrow instructions. The remaining portion of the purchase price for the operating assets of Wescott Oil ($289,399.07) was paid to the taxpayer by the wholly-owned subsidiary of Continental on June 27, 1952. Of such sum, the taxpayer made the following disbursements: $45,123.89 in final payment of the indebtedness of Wescott Oil to the Bank personally assumed by the taxpayer, and $212,480.57 in final payment for the shares which the taxpayer had purchased from Mr. Wescott. After these disbursements, $31,794.61 was left. (R. 38.)

The certificate representing all the stock of Wescott Oil as issued to the taxpayer on June 10, 1952, was released to him by the Bank with the following legend endorsed thereon (R. 38-39):

> June 16, 1952, partial liquidation made this date hereon by distribution to the above-named stockholder, Frank Mattison, of all the real and personal property, investments, fixtures, equipment, contracts, and other valuable rights and liabilities, and all merchandise, accounts and notes receivable of the company excepting only cash and stock of Lilly Seed Co. This stock being hereafter nontransferable, all pursuant to stockholder's and directors' resolution of June 13, 1952.

The taxpayer retained the stock certificate in his

possession until he surrendered it to the corporation for cancellation in June of 1953. (R. 39.)

Subsequent to the conveyance of the operating assets of Wescott Oil to the taxpayer and by him to the subsidiary of Continental on June 16, 1952, Wescott Oil continued to wind up its business affairs until May 12, 1953, at which time the balance of the assets of the corporation, then consisting of cash in the amount of $101,585.76 was distributed to the taxpayer, and he in turn surrendered for cancellation the certificate which he held representing all the outstanding stock of the corporation, which was thereupon cancelled. Wescott Oil was finally dissolved by court decree on June 19, 1953. (R. 39.)

Subsequently, on November 3, 1953, the taxpayer received shares of stock in the Lilly Seed Company, which he sold in 1955 for $1,000, and an insurance refund in the amount of $275.90. (R. 40.)

All of the formalities incidental to a bona fide purchase of Wescott Oil stock and a liquidation of the corporation were observed. (R. 43-44.)

The only unusual factor in taxpayer's purchase of the stock of Wescott Oil was that at the time of purchasing the stock he intended to liquidate the company at a profit. Distributing to himself and reselling the operating assets of the company was an essential part of his plan for liquidation. (R. 45.)

The 2164 shares of Wescott Oil stock purchased by the taxpayer in May of 1952 cost him $1,347,480.57 and the 25 shares he had previously acquired in 1945 cost him $4,841.25. Hence, the total cost of all the stock was $1,352,321.82. (R. 40.)

The parties are agreed that the taxpayer's total gain was $126,099.78. (R. 42.) This is the amount which results from the following computation:

RECEIPTS:		
Sale price of Wescott Oil operating assets to Continental, which is also the fair market value of those assets (R. 40)	$1,689,399.07	
Cash received in liquidation of Wescott Oil in May of 1953 (R. 40)	101,585.76	
Lilly stock and insurance refund received in November of 1953 (R. 40)	1,275.90	
		$1,792,260.73
DISBURSEMENTS:		
Cost of all of the Wescott Oil stock (R. 40)	1,352,321.82	
Obligation of Wescott Oil to Bank personally assumed by taxpayer (R. 40)	310,123.89	
1952 expenses (R. 40)	3,677.07	
1953 expenses (R. 41)	38.17	
		1,666,160.95
		$ 126,099.78

The controversy is as to how and when a portion of that gain is taxable. In their joint tax returns the taxpayers treated the transactions involved as a purchase of corporate *stock* from which capital gain was realized over and above the cost of the stock as and when received in liquidation of the corporation. Thus, in their 1952 joint return they reported capital gain of only $23,276.29 and in their 1953

return reported capital gain of $102,823.49 (the $101,585.76 received in May of 1953, plus the $1,-275.90 in Lilly stock and insurance refund received in November of 1953, less $38.17 in expenses). The $102,823.49 was reported as *long*-term capital gain, as was the portion of the $23,276.29 for 1952 which was attributable to the 25 shares of Wescott Oil stock which the taxpayer had owned before the transactions involved here.[2] (R. 40-41, 43.) The Commissioner's deficiency determination for 1952 (and determination of an overpayment for 1953 (R. 41)) resulted essentially from changing the manner of treating the amount of $101,585.76 which the taxpayer reported as long-term capital gain in 1953. (R. 41.) The Commissioner switched that amount to 1952 income and treated (1) as *long*-term capital gain, the portion attributable to the 25 shares of Wescott Oil stock which the taxpayer had owned since 1945 and (2) as *short*-term capital gain, the remaining portion attributable to the taxpayer's 1952 purchase of 2,164 shares and liquidation of the corporation. (See R. 11-12, 42, 47.) The result was a determination that the taxpayer owed additional taxes in the amount of $69,257.45 for 1952 and was entitled to a refund of $25,859.64 for 1953. This net deficiency of $43,397.81, with interest in the amount of $10,064.08, was paid by the taxpayer and

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[2] The remaining portion of the $23,276.29, reported as short-term capital gain (R. 40), was necessarily short-term capital gain in 1952, since taxpayer had not held for six months either the Wescott Oil stock he purchased in 1952 or the operating assets of Wescott Oil he received and sold to Continental in 1952.

is the amount which he sought to recover in this suit for refund. (R. 41.)

The District Court held that the entire amount of the gain reported by the taxpayer in 1953 as long-term capital gain was properly reported. (R. 47.) Thus, the District Court allowed recovery of the taxes in suit (R. 47) despite the Government's contention that the taxpayer's 1952 purchase of 2,164 shares of Wescott Oil stock and liquidation of the corporation had substance only as a purchase of the *assets* of the corporation (R. 26-29) from which the taxpayer, when he sold the operating assets in 1952, realized short-term capital gain in the amount of the difference between (1) the amount received on the sale of the operating assets in 1952 and (2) that portion of the cost of the 2,164 shares which is allocable to and is the taxpayer's basis for the operating assets.

STATEMENT OF POINTS TO BE URGED

The Government's statement of points is contained in the record at pages 224-225. Briefly, it is our position that the District Court erred in failing to apply, to the taxpayer's 1952 purchase of 2,164 shares of Wescott Oil stock and liquidation of the corporation, the established rule that a purchase of stock for the purpose of acquiring the corporate assets through liquidation is to be treated as a purchase of the corporate *assets*.

SUMMARY OF ARGUMENT

The facts of record and as found by the District Court indisputably show that the taxpayer purchased

all of the outstanding stock of the Wescott Oil Company (other than the 25 shares he already owned) for the purpose of acquiring the assets of Wescott Oil through liquidation of the corporation (and for immediate resale of the operating assets to the Continental Oil Company pursuant to a prior agreement). It is a well established rule that the purchase of stock for the purpose of acquiring the corporate assets through liquidation of the corporation will be treated simply as a purchase of corporate *assets*, with no effect given to the liquidation. Thus, the District Court erred in holding that taxpayer's gain was realized when and to the extent that he received liquidating distributions from Wescott Oil in the years 1952 and 1953. The taxpayer's purchase of stock and liquidation of the corporation must be treated for tax purposes according to their substance, and thus as a purchase of corporate *assets*, with the result that the taxpayer's gain was realized on his sale of the operating assets to Continental, was in the amount received from Continental less the cost basis allocable to the operating assets, was gain realized in 1952, and, except for the amount attributable to the 25 shares of Wescott Oil stock previously owned, was short-term capital gain.

The District Court's error was apparently in assuming that the case is taken out of the above-mentioned rule because the taxpayer also intended to sell the assets at a profit. But that additional purpose did not change the taxpayer's purpose to acquire the corporate assets; it merely made his purpose to ac-

quire the assets more evident. The District Court erred and should be reversed.

ARGUMENT

The District Court Erred In Failing To Hold That, On the Undisputed Facts of the Case, Tax Consequences Must Be Resolved In the Light of the Established Rule That a Purchase of Corporate Stock for the Purpose of Acquiring the Corporate Assets Through Liquidation of the Corporation Is To Be Treated As a Purchase of the Corporate Assets

Involved here is the purchase of corporate stock immediately followed by a liquidation of the corporation (as well as an immediate sale of the operating assets of the corporation pursuant to a previous agreement). Normally, assets received in liquidation of a corporation are treated as being received in exchange for stock (See Section 115(c) of the Internal Revenue Code of 1939, *supra*), with the result that the stockholders do not realize gain until the amounts (or fair market value of property) they receive on the liquidation exceed the cost basis of their stock. However, there is an established exception to the rule giving effect to liquidating distributions. When corporate stock is purchased for the purpose of obtaining the corporation's assets through liquidation of the corporation, the formalities of the stock purchase and liquidation are ignored and the transaction is given effect according to its substance and thus as a purchase of the corporate *assets*. See *Commissioner* v. *Ashland Oil & R. Co.*, 99 F. 2d 588 (C. A. 6th), certiorari denied, 306 U. S. 661; *Kimbell-Diamond Milling Co.* v. *Commissioner*, 14 T.C.

74, affirmed per curiam, 187 F. 2d 718 (C. A. 5th), certiorari denied, 342 U. S. 827; *Kanawha Gas & Utilities Co.* v. *Commissioner*, 214 F. 2d 685 (C. A. 5th); *Koppers Coal Co.* v. *Commissioner*, 6 T. C. 1209; *Cullen* v. *Commissioner*, 14 T. C. 368; *Snively* v. *Commissioner*, 19 T. C. 850, affirmed on other grounds, 219 F. 2d 266 (C. A. 5th); *Montana-Dakota Utilities Co.* v. *Commissioner*, 26 T. C. 408. In such a case, the stock purchase and liquidation are without tax consequence; the entire transaction merely constitutes a purchase of property from which gain is realized only when and if the acquired assets are sold or otherwise disposed of.

Tax consequences in the present case depend upon whether, as we contend, the District Court erred in failing to apply the latter rule. If applicable here, the taxpayer acquired corporate *assets*, and the fact that he acquired those assets through a purchase of stock and liquidation of the corporation is immaterial and without tax effect. His realization of gain occurred when he sold or otherwise converted those assets. He of course immediately sold the major portion of the assets (the operating assets) to Continental for $1,689,399.07 in cash, so that his gain on the sale is necessarily *short*-term capital gain (except to the extent of the gain, as allowed by the Commissioner, attributable to the 25 shares of stock he had owned since 1945). By selling the operating assets, the taxpayer realized gain in the amount by which the $1,689,399.07 he received in 1952 from Continental exceeded the cost of such operating assets to him. His cost basis for the operating assets was

necessarily that portion of the cost of *all* the assets which is allocable to the *operating assets* or, in other words, the total cost to him of the Wescott Oil stock [3] *less* the fair market value of the other property (102,823.49) which he received in cash or property in the following year (1953). See, e.g., *Graves* v. *Commissioner*, decided May 14, 1952 (1952 P-HT.C. Memorandum Decisions, par. 52,143). Thus, the taxpayer's entire gain from the purchase of the Wescott Oil stock and the liquidation of the corporation was realized in 1952 and was short-term capital gain (except to the extent of the amount attributable to the 25 shares he previously owned), as the Commissioner determined in his deficiency notice, if, as we contend, the taxpayer's purchase of stock and liquidation of the corporation are to be treated as one integrated transaction consisting of a purchase of corporate *assets*.

The District Court's findings of fact make it readily apparent that the taxpayer purchased the stock of Wescott Oil for the purpose of acquiring the assets of the corporation through liquidation. The taxpayer entered into an agreement to sell Wescott Oil's operating assets to Continental even before he approached the other stockholders to buy their stock. (R. 18, 36, 57-59, 125-126, 162-164, 225; Exs. G, H.) Indeed, his stock purchase was financed with the funds he received from Continental for the operating

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[3] We concede that the taxpayer's cost basis includes the $310,123.89 liability of Wescott Oil to the Bank which he personally assumed. See *Montana-Dakota Utilities Co.* v. *Commissioner, supra.*

assets. (R. 38, 125-126, 171-172.) After obtaining options to buy all of the stock, the stock was deposited in escrow and a single stock certificate was issued to the taxpayer. (R. 36-37.) Then, all within three days, the taxpayer, as sole stockholder, called a stockholders' meeting at which it was resolved to liquidate and dissolve the corporation, immediately following that a directors' meeting was also called at which it was resolved to transfer the operating assets to the taxpayer, and taxpayer in turn conveyed those operating assets to Continental. The distribution of the operating assets to the taxpayer and his sale of those assets to Continental occurred all in one day (R. 37-38), with all the essential documents having been prepared in advance (R. 163-166). Liquidation of the remaining assets, totalling $102,861.66, continued into 1953, but there can be no doubt that the taxpayer acquired the corporate stock for the purpose of acquiring the corporate assets through liquidation, so that he could sell the bulk of those assets to Continental. As a matter of fact, he could not have otherwise paid for the stock. Thus, the taxpayer himself testified that his motivating purpose was to secure the assets of Wescott Oil.[4] (R. 173.)

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[4] It may also be noted that what the parties accomplished —a sale of the operating assets to Continental—was exactly what Continental desired but which the parties apparently did not want to effect *directly* because of possible tax consequences. Mr. Wescott had previously negotiated with Continental, but those negotiations broke down not only because Continental was unwilling to pay the price demanded by the Wescott Oil stockholders for their stock (R. 34-35) but

As we interpret the District Court's findings and opinion, the court itself conceded that the taxpayer's purpose was to acquire the corporate assets. The court stated in its findings that the taxpayer "purchased the stock of Wescott Oil Company, not its assets" (R. 43), and of course that is true from the standpoint of *form*. The court also found as a fact that the distribution of corporate assets to the taxpayer "was, of course, an essential part of his plan of liquidation." (R. 45.) The court further found that the taxpayer did not acquire the stock "solely" in order to acquire Wescott Oil's *operating* assets, since the taxpayer "was interested in the operating assets of the company only insofar as they were part of his over-all plan to liquidate the company at a profit." (R. 45.) In its opinion the District Court also stated that the taxpayer purchased the stock

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because Continental was interested only in buying the assets, that is, the operating assets, of Wescott Oil (R. 36-38, 104-105, 150-151). And Mr. Wescott testified that he had been too well informed taxwise to consummate the transaction in the latter fashion because of the adverse tax consequences which would follow therefrom, and that his tax attorney had advised him "not to do that". (R. 104-105.) They were quite obviously concerned lest both the corporation and the individual stockholders (then including Mr. Wescott, the taxpayer, and others), as distributees, would be required to pay income tax on the profits from such a sale (Cf. *Commissioner* v. *Court Holding Co.*, 324 U. S. 331), and the record shows that the taxpayer continued thereafter to be much concerned about this possibility, as indicated by his repeated attempts to secure the advice of tax counsel in respect of the tax effects of the transaction, both in respect of "My [personal] tax matters," and also those of Wescott Oil. (R. 135-137, 167-169, 193-194.)

"intending to liquidate the corporation, sell the assets, and thereby make a profit." (R. 28-29.)

We are therefore somewhat at a loss to understand why the District Court did not apply the well-settled rule that a purchase of stock for the purpose of acquiring the corporate assets through liquidation is to be treated according to its substance and thus as a purchase of the corporate assets. On the facts as found by the court, it is indisputable that the taxpayer purchased the stock of Wescott Oil for the purpose of liquidating the corporation and thereby acquiring the assets of the corporation. That he also intended to sell those assets when he acquired them, and at a profit, does not change the fact that his stock purchase and liquidation of the corporation were integrated parts of a plan to acquire the assets. Had he not sold the operating assets to Continental, his stock purchase and liquidation of the corporation would not have resulted in the realization of gain, but it would still be treated as a purchase of *assets.* See *Commissioner* v. *Ashland Oil & R. Co., supra; Kimbell-Diamond Milling Co.* v. *Commissioner, supra; Kanawha Gas & Utilities Co.* v. *Commissioner, supra; Snively* v. *Commissioner, supra; Cullen* v. *Commissioner, supra; Koppers Coal Co.* v. *Commissioner, supra; Montana-Dakota Utilities Co.* v. *Commissioner, supra.* The principle involved here is that a stock purchase for the purpose of acquiring the corporate assets through liquidation of the corporation eliminates the liquidation of the corporation as a taxable event, there being no real exchange of stock for assets of the corporation,

and postpones the taxable event until there is a sale or other disposition of the assets. The fact that the taxpayer planned to sell and in fact sold the operating assets to Continental resulted in the realization of gain by him in a transaction which has nothing to do with his purpose to acquire the assets other than to make the latter purpose all the more evident; it did not change that purpose. Thus, if the District Court thought otherwise, as indicated at one point in its opinion (R. 29), the court was in error.

On the question of whether the taxpayer's stock purchase and liquidation of the corporation are to be given effect simply as a purchase of corporate assets, the District Court's decision is plainly contrary to the pertinent decisions. The applicable rule was first enunciated in *Commissioner* v. *Ashland Oil & R. Co.*, *supra*, where the question was as to the cost basis, for depletion purposes, of the acquired assets. There one corporation (Swiss) had originally attempted to buy outright the properties of another corporation (Union) but Union refused to sell because (as shown in the dissenting opinion, p. 593) it would have been required to pay tax on the profit—just as would have been the situation had Wescott Oil sold outright to Continental in the instant case (R. 104-106). Hence, the stockholders of Union agreed to give Swiss an option to purchase all the stock of Union for a stipulated price. The stock was to be placed in escrow and Union was to continue to operate the property until the net proceeds from operations equalled $1,000,000 which was to be paid to the stockholders of Union. The stock was

then to be delivered to Swiss by the escrow agent. The sale of stock was to carry with it only the oil and gas leases owned by Union, the balance of the assets to be distributed to Union's stockholders. Union's stockholders were also to assume Union's liabilities. Upon delivery of the stock to Swiss, Union was liquidated, and the oil and gas leases were distributed to Swiss which then used them in its business. The Commissioner attempted to tax the gain derived by Swiss upon the liquidation of Union. The taxpayer contended successfully there, however, that the acquisition of Union's stock and the liquidation of that corporation were merely steps in a unitary plan to acquire Union's oil producing properties, and that no taxable gain was realized since the properties were still owned by it. The court found from a consideration of all the circumstances of that case that Swiss' dominant purpose in entering into the agreement was to acquire the oil and gas properties of Union and, upon thus finding that the liquidation of Union was an intermediate step in a unified plan to acquire its properties, the court refused to impose a tax upon the liquidation step by recognizing gain thereon. Rather, the court held that the transaction should be viewed as a whole, that the purchase of stock was merely a step in the acquisition of the corporate assets, and that the purchasers' basis for depletion was the cost of the stock to it. In deciding in favor of the taxpayer, the court noted that the exhibits and witnesses in the case fully disclosed Swiss' plan to secure Union's properties. The court stated (p. 591):

> It has been said too often to warrant citation that taxation is an intensely practical matter, and that the substance of the thing done and not the form it took must govern. This principle has been repeatedly invoked by the Commissioner and applied by the Board. *Carter Publications, Inc.* v. *Commissioner*, 28 B.T.A. 160; *Warner Co.* v. *Commissioner*, 26 B.T.A. 1225; *George Whittell & Co., Inc.* v. *Commissioner*, 34 B.T.A. 1070. And without regard to whether the result is imposition or relief from taxation, the courts have recognized that where the essential nature of a transaction is the acquisition of property, it will be viewed as a whole, and closely related steps will not be separated either at the instance of the taxpayer or the taxing authority. *Prairie Oil & Gas Co.* v. *Motter*, 10 Cir., 66 F. 2d 309; *Tulsa Tribune Co.* v. *Commissioner*, 10 Cir., 58 F. 2d 937, 940; *Ashles Realty Corp.* v. *Commissioner*, 2 Cir., 71 F. 2d 150; *Helvering* v. *Security Savings Bank*, 4 Cir., 72 F. 2d 874.
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> * * * *
>
> It is not decisive that the purpose of Swiss to acquire the Union properties is not recited in formal agreements executed to bring about that result if such purpose is disclosed by circumstances which beyond controversy proclaim it. Nor does the fact that the Union stock was held by Swiss for almost a year destroy the transitory character of such holding when the terms of the contract are considered.

In the District Court the taxpayer attempted to distinguish the *Ashland* case on the ground that it involved a hybrid transaction, asserting that the

provision attaching only to the oil and gas properties of Union makes it impossible to apply the *Ashland* rule to a situation, such as that in the instant case, where the purchaser of the stock acquires all the rights and liabilities normally attendant upon stock ownership. While it is true that Swiss, in purchasing Union's stock, acquired neither all of its assets nor any of its liabilities, yet this in itself is clearly not a sufficient reason for refusing application of the rule of the *Ashland* case to the situation where the purchaser of the stock acquired rights in all of the corporation's assets and liabilities, providing it is equally clear that the essential nature of the transaction is the acquisition of property, as here. The factual distinction alleged actually makes the instant case an *a fortiori* proposition. The formalism of a liquidation distribution could not be used in *Ashland* to successfully deflect the proper incidence of taxation, nor can it here. The crucial point is, of course, that in cases of this sort the liquidation is not given effect, since the ultimate factual result of a purchase and sale of all the stock of a corporation and the liquidation of that corporation shortly thereafter is, in substance and for tax purposes, merely a purchase of the corporate assets.

In *Kinbell-Diamond Milling Co.* v. *Commissioner*, *supra*, the taxpayer-corporation had suffered the loss of its plant by fire and recovered the insurance thereon. Its board of directors resolved to use the insurance proceeds to acquire the stock of another corporation (Whaley) which was engaged in the same business. The resolution recited that as soon as

the stock was obtained Whaley would be liquidated and all of its assets distributed to the taxpayer. Its primary object, of course, was to obtain Whaley's plant to replace its own. The question before the court there was whether the taxpayer was entitled to use Whaley's cost basis as its basis for the assets acquired from Whaley, as it urged, or whether, as the Commissioner contended, its basis in the assets was the cost of Whaley's stock. The Tax Court had held that the taxpayer's proper basis in the assets was its cost in obtaining Whaley's stock. In so holding, it was necessary for the Tax Court to pass on the taxpayer's contention that it was entitled to Whaley's basis in the assets because the acquisition of Whaley's stock and its subsequent liquidation were two separate transactions. From an examination of the minutes of the meetings of the taxpayer's board of directors and from the document evidencing the program of the complete liquidation of Whaley, however, the Tax Court determined that the only intention the taxpayer ever had was to acquire Whaley's assets, and thus, relying on the *Ashland* case, *supra*, it stated (p. 80):

> We hold that the purchases of Whaley's stock and its subsequent liquidation must be considered as one transaction, namely, the purchase of Whaley's assets which was petitioner's sole intention.

The Fifth Circuit affirmed *per curiam*, *supra*, and hence this case as well as the other analogous decisions above-cited hold generally that, where the substance of a transaction is the purchase of assets, the

corporate liquidation step in the process is to be ignored in determining the tax effect of the transaction, even where the purchaser of stock acquires all the rights and liabilities normally constituting stock ownership, and even where there appear to have been no negotiations, preceding the stock-purchase plan, for the purchase of the assets directly.

In a number of other cases involving variant factual situations the courts have held that the component parts of a single transaction cannot be treated separately for the purpose of levying income taxes. For instance, in *Mather* v. *Commissioner*, 149 F. 2d 393 (C. A. 6th), certiorari denied, 326 U. S. 767, it was held that residuary legatees of an accommodation indorser of a note who, through the transfer of the assets of the estate to a corporation and its subsequent liquidation, paid the balance owing on the note, were not entitled to a bad debt deduction. In ignoring the transfer to the corporation, the court stated (p. 397):

> * * * and the courts have recognized that where the essential nature of a transaction is the acquisition of property, it will be viewed as a whole, and closely related steps will not be separated either at the instance of the taxpayer or the taxing authority.

See also, *Tulsa Tribune Co.* v. *Commissioner*, 58 F. 2d 937, 940 (C. A. 10th); *Ahles Realty Corp.* v. *Commissioner*, 71 F. 2d 150 (C. A. 2d); Paul, Selected Studies in Federal Taxation (2d Series), pp. 205-214.

In view of the foregoing, it is clear, we submit, that, on the facts of record and in the light of the authorities above cited, the taxpayer acquired the stock of Wescott Oil for the purpose of obtaining its assets, through the liquidation of the corporation (for immediate resale of the operating assets to Continental), and, accordingly, that the transaction must be given effect according to its substance, that is, as a purchase of the corporate *assets* by the taxpayer. It follows that, contrary to the District Court's holding, all of the gain realized by the taxpayer in the transaction in question (with a small exception as specified in the record) is taxable as short-term capital gain for the taxable year 1952.

CONCLUSION

The judgment of the District Court is incorrect and should be reversed.

Respectfully submitted,

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MAY, 1959.

APPENDIX

Schedule of exhibits identified, offered and received or rejected as evidence.

Taxpayer's Exhibits [5]	Identified	Offered	Received in Evidence	Rejected
A	R. 17, 57-59	R. 57-59	R. 17, 57-59	
B	R. 17, 57-59	R. 57-59	R. 17, 57-59	
C	R. 17, 57-59	R. 57-59	R. 17, 57-59	
D	R. 17, 57-59	R. 57-59	R. 17, 57-59	
E	R. 17, 57-59	R. 57-59	R. 17, 57-59	
F	R. 18, 57-59	R. 57-59	R. 18, 57-59	
G	R. 18, 57-59	R. 57-59	R. 18, 57-59	
H	R. 18, 57-59	R. 57-59	R. 18, 57-59	
I	R. 18, 57-59	R. 57-59	R. 18, 57-59	
J	R. 18, 57-59	R. 57-59	R. 18, 57-59	
K	R. 18, 57-59	R. 57-59	R. 18, 57-59	
L	R. 18, 57-59	R. 57-59	R. 18, 57-59	
M	R. 18, 57-59	R. 57-59	R. 18, 57-59	
N	R. 18, 57-59, 143	R. 57-59	R. 18, 57-59	
O	R. 19, 57-59	R. 57-59	R. 19, 57-59	
P	R. 19, 57-59	R. 57-59	R. 19, 57-59	
Q	R. 19, 57-59	R. 57-59	R. 19, 57-59	
R	R. 59-60	R. 59-60	R. 59-60	
S	R. 60	R. 60	R. 60	
T	R. 60	R. 60	R. 60	
U	R. 60-61	R. 60-61	R. 60-61	
V	R. 61	R. 61	R. 61	
W	R. 63	R. 66	R. 66	
X	R. 63-64	R. 67	R. 67-68	
Y	R. 64	R. 68	R. 68-69	
Z	R. 119	R. 121	R. 121	
AA	R. 142	R. 143	R. 143	
Government's Exhibit				
#1	R. 198-199			R. 200-201

[5] The taxpayer's exhibits A-Q were initially stipulated by the parties to be identified and received as evidence (R. 17-19, 57-59).

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No. 16257

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*

vs.

FRANK N. MATTISON and IDA C. MATTISON, *Appellees*

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

BRIEF ON BEHALF OF APPELLEES

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INDEX

CITATIONS

Cases

Page

Statutes

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I. INTRODUCTION

Frank N. Mattison and his wife, the appellees, have for many years reported their income and expenses for each calendar year on the cash basis. The transactions here in question are those of Frank N. Mattison. For convenience he will sometimes be referred to as "Mattison." Appellant will usually be referred to as "the Government."

In June of 1952 Mattison purchased the remainder of the outstanding stock of the Westcott Oil Company, a successful and sizeable corporation engaged in the business of distributing petroleum products, hereinafter sometimes referred to as "the Company," hoping to make a profit through its liquidation. Immediately, after acquiring this stock, he distributed the operating assets to himself, sold them, and, before the close of 1952 realized a gain of $23,267.29. This gain the Mattisons reported in their joint return for the calendar year

1952 partly as short term capital and partly as long term capital gain.

The Westcott Oil Company was a large and complex business. When its liquidation was completed the Company distributed to Mattison between May and November of 1953 the sum of $102,861.66. This final distribution less a small amount of expenses the Mattisons reported in their return for the calendar year 1953.

The Trial Court below found that this final distribution was taxable to the Mattisons in 1953, when received. From this result the Government has appealed, urging that these funds are taxable in 1952.

II. QUESTION PRESENTED

Whether the Trial Court erred in holding that the final distributions in liquidation of the Westcott Oil Company were taxable to Mattison in the year in which such distributions were made by the Company and received by Mattison.

III. STATUTES INVOLVED

Internal Revenue Code of 1939:

Sec. 41. *General Rule.*

"The net income shall be computed upon the basis of the taxpayers' annual accounting period (fiscal year or calendar year as the case may be) . . .
Sec. 42. *Periods in which item of gross income included.*

"(a) The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer . . ."
Sec. 115. *Distribution by corporations.*

"(c) *Distribution in liquidation.* Amounts dis-

tributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock."

Sec. 117. *Capital Gains and Losses.*

"(a) *Definitions*—As used in this chapter—

(4) (as amended by Sec. 150(a)(1) of the Revenue Act of 1942, c. 619, 56 Stat. 798) *Long-term capital gain.*—The term 'long-term capital gain' means gain from the sale or exchange of a capital asset held for more than 6 months, . . ."

Section 39.115(c)-1 of Regulations 118 promulgated by the Commissioner under the Internal Revenue Code of 1939 provides in part:

"(a) Amounts distributed in complete liquidation of a corporation are to be treated as in part or full payment in exchange for the stock so cancelled or redeemed. The gain or loss to a shareholder from a distribution in liquidation is to be determined, as provided in section 111 and § 39.111-1, by comparing the amount of the distribution with the cost or other basis of the stock provided in section 113; . . .

"(b) The term 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock. . . .

* * *

"(d) For the purposes of the last sentence of section 115(c), a liquidation may be completed before the actual dissolution of the liquidating corporation but no liquidation is completed until the liquidating corporation and the receiver or trustees

in liquidation are finally divested of all the property (both tangible and intangible)."

IV. COUNTER-STATEMENT OF FACTS

The facts are set forth in the findings of fact by the Trial Court (R. 31-45) and summarized in its published opinion[1] (R. 21-31). The chronology of events is accurately set forth in Appellant's brief (App. Br. p. 3 through 11). No need appears for extensive repetition.

The only substantial criticism of Appellant's statement of facts is that it fails to direct the Court's attention to the fact that Mattison made a bona fide purchase of stock (R. 44) and realized the profit here in question as a result of the successful liquidation of a highly complex business organization rather than from a sale of its physical properties (R. 43). Appellee's counter statement of fact will be limited to this area of difference.

The Westcott Oil Company had been in existence for over 30 years, engaged in the business of selling gasoline and related petroleum products in the states of Idaho and Oregon (R. 33). It was a very successful business venture, earning sizeable profits and paying dividends. Its name was well known (R. 33). Its operation extended over almost the entire state of Idaho and parts of Oregon (R. 90, 141). At the time Mattison acquired its stock its facilities consisted of 24 bulk plants (R. 90, 140), (40 filling stations (R. 140) and thousands of items of personal property (R. 141). The Company also had very substantial liabilities including a note in the amount of $310,123.89 to the First Security Bank of Idaho (R. 40). It filed income tax returns with the Unit-

[1] *Mattison v. United States,* 163 F.Supp. 754.

ed States and two states and was liable for numerous other taxes, the amounts of which were uncertain (R. 91, 92, 135, 136).

Ike Westcott contacted several parties in an effort to sell the stock of the Westcott Oil Company (R. 34, 81, 82, 83). No negotiations by the selling stockholders were ever undertaken with Mattison or anyone else for a sale of assets (R. 34). The price which the selling stockholders demanded was an amount sufficient to net them $500.00 per share after taxes (R. 34). This price was not based upon an appraisal of assets but was simply a price the selling stockholders picked out of the air as the price they wanted for their shares (R. 35, 83, 84, 85, 86, 87, 112). There was no direct connection between this price and the value of the Company's physical properties (R. 35, 44). This price took into account the earning history of the Company, its going concern value, its good will and other factors (R. 44, 112, 113).

The selling stockholders testified they sold stock, not assets (R. 80, 87, 88, 89, 187, 214). Mattison testified he purchased stock, not assets (R. 126-129). All the formalities and legal requirements incident to a purchase of stock were complied with and all the instruments involved in the transaction contemplated a purchase of stock (R. 43). Mattison by the purchase of the outstanding stock of the Westcott Oil Company acquired not only the assets of the Company but also all its sizeable liabilities including a liability of $310,000.00 to the First Security Bank of Idaho, known and unknown liabilities for taxes, and liability for all future claims of every nature which might be made against the Company.

Mattison acquired the cash funds of the company, its accounts receivable, and its accounts payable. In short, Mattison acquired every right and liability and every advantage and disadvantage which goes with the usual purchase of stock. There were no side agreements between Mattison and the selling stockholders which would distinguish the transaction between them from an ordinary purchase of stock. Mattison, in short, purchased the stock of the Westcott Oil Company, not its assets (R.43). At the time Mattison purchased the outstanding stock of the Company and for some time thereafter there was considerable uncertainty as to whether final liquidation would be effected at a profit or at a loss (R. 85, 136). Corporate income tax returns for the year 1952 were not filed until March of 1953 (R. 143).

Mattison's purpose in acquiring the stock of Westcott Oil Company was not to acquire any specific physical assets but rather to liquidate the Company, he hoped at a profit (R. 21, 45). The winding up and liquidation of the Westcott Oil Company was accomplished as expeditiously as was reasonable in view of complexities involved (R. 43). Between May and November of 1953, as result of final liquidation, Mattison received a total of $102,861.66 (R. 41). The profit Mattison received in 1953 resulted from the complete liquidation of the Company over a period of time (R. 43).

There is no dispute between the parties as to the amount of Mattison's gain. The only dispute is as to the years in which it was received. The Trial Court found this gain was realized partly in 1952 and partly in 1953 as follows:

1952

Received in partial liquidation		
Physical assets having fair market value of	$1,689,399.07	
Less obligations assumed in the amount of	310,123.89	
Net receipts	$1,379,275.18	
Cost of shares surrendered		
25 shares acquired in 1945 at $	4,841.25	
2164 shares acquired in June 1952 at	1,347,480.57	
Total basis of shares	$1,352,321.82	
Gross profit	26,953.36	
Expenses incurred	3,677.07	
Taxable gain		$ 23,276.29

1953

Received in liquidation		
May 12, 1953	$ 101,585.76	
November 3, 1953	1,275.90	
Total received in final distributions	$ 102,861.66	
Cost of shares	0.00	
Gross profit	$ 102,861.66	
Expenses	38.17	
Taxable gain		$102,823.49
Total for both years		$126,099.78

V. ARGUMENT

1. The Trial Court correctly applied to the facts the well-established rules and precedents for determining the reporting of gains to stockholders from corporate liquidations

The Government brief overlooks some basic statutes and principles of taxation. The first such principle plainly set out in Sec. 41 of the Internal Revenue Code of 1939,[2] the Regulations of the Commissioner[3] and long recognized by the courts,[4] is that each twelve month tax period stands on its own basis unaffected (in the absence of specific provisions to the contrary) by what may or may not happen in following years. The second such basic principle is that income is taxable to a cash basis taxpayer in the year in which it is actually or constructively received.[5]

The problem of when in the light of these principles a gain or loss resulting from the liquidation of a corporation should be taken into account by the stockholders of such corporation for tax purposes has been considered many times by the Federal Courts and the Tax Court. One of the leading cases not only arose in this circuit but involves liquidation of an Idaho corporation. In

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[2] 26 U.S.C. 1952 ed. 41; Sec. 441, Internal Revenue Code of 1954.

[3] Sec. 39.41-1, Regulations 118, state in part: "Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year." See also Sec. 39.41-4 of Regulations 118.

[4] *Security Flour Mills v. Commissioner*, 321 U.S. 281 (1944); *Heiner v. Mellon*, 304 U.S. 271 (1938); *Guardian Investment Corp. v. Phinney*, 253 F.2d 326 (CA 5th 1958); *Virginia-Lincoln Furniture Corp. v. Commissioner*, 56 F.2d 1028 (CCA 4th 1932).

[5] Sec. 42(a), Internal Revenue Code of 1939, 26 U.S.C. 1952 ed. 41; Sec. 451(a), Internal Revenue Code of 1954; Sec. 39.42-1, Regulations 118.

Case v. Commissioner, 103 F.2d 283 (1939) the Ninth Circuit decisively rejected the Government's argument that a controlling stockholder or even one with impressive contract rights can be taxed on assets belonging to a corporation in the process of liquidation prior to the time they are actually distributed to him.

Case and one Peckham, except for directors' qualifying shares, owned all of the stock of an Idaho corporation engaged in the furniture business known as "Peckham & Case." Peckham owned 103 shares and Case owned 85. Desiring to separate the business, a contract was executed providing that 85/188ths of the assets of Peckham & Case would be transferred to a new corporation known as "Case Furniture Company" in exchange for its outstanding stock and that thereafter Peckham & Case would transfer such shares to Mr. Case in exchange for his shares in the old corporation. Reorganization was effected during 1928, substantially as provided, with one important exception, *i.e.* Peckham & Case did not actually transfer its shares of the Case Company to Mr. Case until 1931. The Commissioner and the Tax Court held that in 1928 Mr. Case realized a taxable profit measured by the excess of the fair market value of the Case Company stock over the cost basis of his shares in Peckham & Case. The taxpayer appealed, claiming that his profit from this exchange was not realized until 1931 when the shares of Case Company stock were actually delivered to him.

This Circuit, adhering to the principles just discussed, reversed the Tax Court in an opinion by Judge Stephens, holding at page 287:

"It is elemental in income tax law that a gain is

not taxable until it is realized. The argument of the taxpayer is that he realized no gain in 1928, since the actual stock certificates were not exchanged until 1931.

"The Board of Tax Appeals based its decision that the gain was realized in 1928 on the fact that the taxpayer had a specifically enforceable contract in that year under which he could have compelled the Peckham-Case Company to turn over the Case Furniture Company stock to him.... It is therefore argued that the taxpayer owned the beneficial interest in the Case Furniture Company stock, and that the fact that the stock certificates did not pass between him and the Peckham-Case Company until 1931 is not controlling.

* * *

"We do not think it can properly be said that there was a constructive receipt by the taxpayer of the Case Furniture Company stock during that year. It should be remembered that the taxpayer is being taxed on the exchange of his Peckham-Case Company stock for stock of the new corporation, Case Furniture Company. We have held that this is in the nature of a distribution in partial liquidation of Peckham-Case Company. However, the fact that Peckham-Case Company may have been obligated to make this exchange does not mean that at that point it was taxable to the taxpayer."

In line with the holding of this circuit, other circuits, as well as the Tax Court and its predecessor, the Board of Tax Appeals, have generally held in corporate liquidations that gain is neither taxable nor loss deductible until the assets are actually distributed to the stockholder. This result naturally follows from the fact that so long as assets are retained by the corporation they

are first subject to its debts and only when they are distributed do they become the property of the stockholder. Gain is taxable to the extent of such excess as soon as the taxpayer receives an amount in liquidation in excess of the cost basis of his shares. A loss, however, may not be claimed until the liquidation is fully completed, *Northwest Bancorporation v. Commissioner,* 88 F.2d 293 (CCA 8th, 1937); *Dresser v. United States,* 55 F.2d 499 (Ct. Cl. 1932).[6]

Where an individual purchases the outstanding stock of a corporation and proceeds to liquidate that corporation by a series of distributions occurring in separate taxable years, it is impossible to allocate the price paid for the stock between the varied assets of the corporation with the precision necessary to report the profit or loss realized as result of the distribution of each asset. For example, a corporation owns land, buildings, inventory, trucks, good will, trade marks and other assets. It is impossible from the purchase of stock to say that the purchaser paid any specific price for each of these assets.

Because of this factor it has long been the established rule in reporting the gain from successive corporate distributions in liquidation that the present market value of each asset distributed is applied against the total cost basis to the stockholder of his stock. After

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[6] See also: *G. Harold Earle v. Commissioner,* T.C.M. 1945 No. 281; *George Mackubin v. Commissioner,* T.C.M. 1948 No. 072; *Mrs. Grant Smith v. Commissioner,* 26 B.T.A. 1178 (1932); *Kirby v. Commissioner,* 35 B.T.A. 578 (1937); *Rex Brugh v. Commissioner,* 32 B.T.A. 898 (1935); *Harkness v. Commissioner,* 31 B.T.A. 1100 (1935); *Kell v. Commissioner,* 31 B.T.A. 212 (1934); *S. D. Sutliff v. Commissioner,* 4 B.T.A. 1068 (1926); and General Counsel Memorandum Opinion, No. 14207; Cumulative Bulletin XIV-1 at page 68 (1934).

such cost basis has been recovered the value of all property thereafter received by way of further distribution is 100% gain. *Letts. v. Commissioner,* 30 B.T.A. 800, Affirmed 84 F.2d 760 (CCA 9th 1936); *Westover v. Smith,* 173 F.2d 90 (CA 9th 1949); *Word Supply Co. v. Commissioner,* 41 B.T.A. 965 (1940); *Alvina Ludorff et al. v. Commissioner,* 40 B.T.A. 32 (1939); *Florence M. Quinn v. Commissioner,* 35 B.T.A. 412 (1937). This rule appears in most of the recognized tax services and texts.[7]

The Trial Court concluded on the basis of the foregoing authorities that "where several distributions are made in the process of completely liquidating a corporation the distributions received are first applied to reduce the cost basis of the stock and capital gain is only realized when the amount of the liquidating dividends exceed the costs basis" (R. 27). The Trial Court further concluded "it appears to be the general rule that such gain is only realized and recognized when it is actually received by the shareholder" (R. 27). Applying these rules to the facts the Trial Court held that the final distributions totaling $102,861.66 which Mattison received between May and November 1953 from the complete liquidation of the Westcott Oil Company were taxable to him in 1953 and not in 1952 as the Government contends (R. 46).

In their appeal the Government does not dispute that the Trial Judge correctly stated the general rules governing the taxation of successive distributions in the

[7] Prentice-Hall—Federal Taxes, Sec. 9195 A; Commerce Clearing House, Inc., Standard Federal Tax Reporter Sec. 2403; Mertens, Law of Federal Income Taxation, Sec. 9.86.

liquidation of a corporation (App. Br. p. 13). Nor does the Government dispute that the result reached by the Trial Court would follow from the application of these established rules to the facts.

The Government urges upon appeal as it did upon the Trial Court that an exception to these general rules is required by the following cases: *Commissioner v. Ashland Oil & Refining Company,* 99 F.2d 588 (CCA 6th, 1938); *Kimbell-Diamond Milling Company v. Commissioner,* 14 T.C. 74, affirmed per curiam 187 F.2d 718 (CA 5th 1951); *Kanawha Gas and Utilities Company v. Commissioner,* 214 F.2d 685 (CA 5th 1955); *Koppers Coal Co. v. Commissioner,* 6 T.C. 1209; *Cullen v. Commissioner,* 14 T.C. 368; *Snively v. Commissioner,* 19 T.C. 850; and *Montana Utilities Company v. Commissioner,* 25 T.C. 408 (App. Br. pp. 13 and 14). To this contention Appellees take earnest exception.

2. The cases cited in Appellant's Brief do not upon the facts of this case require that any exception be made to the established rules, statutes and regulations governing the taxation of gains from corporate liquidations

The Government appeal is predicated upon the proposition that the cases just cited (p. 13) establish the rule "that a purchase of corporate stock for the purpose of acquiring the corporate assets through liquidation of the corporation is to be treated as a purchase of the corporate assets," and that the Trial Court erred in not applying this rule to the facts as found (App. B, p. 13). With this statement Appellees disagree completely. Inasmuch as the Government contends that the Trial Court erred in interpreting the holding of these cases, let us

examine them for the purpose of determining just what rule is established in these cases and to what factual situations it has been applied.

The first case upon which the Government relies as requiring reversal of the Trial Court is *Commissioner v. Ashland Oil and Refining Company, supra.* Ashland's predecessor, Swiss Oil Corporation, had for several years been negotiating with Union Gas & Oil Company for the purchase of certain oil producing properties which were essential to the operation of Swiss (there were no negotiations by Mattison or anyone else with the selling stockholders for the purpose of purchasing assets, nor did Mattison have any specific interest in the physical assets of the Westcott Oil Company). Following these negotiations Swiss entered into a curious contract with the stockholders of Union, solely for the purpose of acquiring the aforementioned assets. Under this contract, Swiss, it is true, agreed to purchase the outstanding stock of Union. However, the contract provided that the sale of stock did not carry with it the inventory, money, notes, accounts receivable or credits of Union and that all its liquid and intangible assets would be distributed to the old stockholders of Union in proportion to their holdings. In other words, nothing but the specific oil properties in which Swiss was interested passed upon the purchase of Union stock. (Here Mattison acquired the entire bundle of rights which go with an ordinary purchase of stock without any reservations or restrictions whatever.) This remarkable stock purchase contract further provided that the stockholders of Union were to pay all the known liabilities of Union and were to indemnify Swiss against all future claims which

might be made against Union. (There was no such reservation in Mattison's purchase of the stock of Wescott Oil Company. He assumed all the liabilities of the corporation, both known and unknown.) After Swiss acquired the "stock" of Union it dissolved Union and incorporated the oil properties it so acquired into its own operations. (Mattison did not retain any of the physical assets of the Westcott Oil Company.) Ashland, the successor to Swiss, for purposes of depletion claimed as its cost basis for these oil properties the price it had paid for the "stock" of Union. The Commissioner contended that since these assets had been acquired as result of the tax free liquidation of a subsidiary, Ashland could claim only the cost basis of these assets on the books of Union which was a very substantially smaller amount. (The present case does not involve the same question.) The Tax Court held in favor of the Commissioner.

The Court of Appeals for the Sixth Circuit upon an appeal by Ashland concluded that this hybrid contract was more in the nature of a sale of properties than a sale of stock and that for purposes of depletion Ashland could use the price it paid for the "stock" of Union. In so holding the Court stated, at page 591:

> "It seems clear that the transaction, though in form a purchase of stock, was in substance a purchase of the oil and gas leases belonging to Union. They could not otherwise be acquired. The reservation by the Union stockholders of cash, oil, notes, accounts, credits and securities clearly indicates that all that Union stockholders were selling and all that Swiss (predecessor of Ashland) was buying were the oil and gas leases. The unused material and equipment on hand and in storage on the prop-

> erties would be useful in operations, but they likewise were reserved to be subjects for future barter apart from the stock. The Union stockholders were to pay all taxes and other obligations incurred prior to the initial payment, and to indemnitfy Swiss against any claims either in tort or upon contract that might accrue against Union prior to the date of the cash payment. In all essential respects this agreement segregated the oil and gas properties from all of the other assets of Union and freed them from accrued liability."

None of the factors which were determinative in the *Ashland* case are here present. Mattison, as the Trial Court found, made a simple purchase of stock (R. 44).

Three other opinions of United States Circuit Courts of Appeal are briefly mentioned in Appellant's brief at page 24. They are *Tulsa Tribune Co. v. Commissioner,* 58 F.2d 937 (CCA 10th 1932); *Ahles Realty Corp. v. Commissioner,* 71 F.2d 150 (CCA 2nd 1934) and *Mather v. Commissioner,* 149 F.2d 393 (CCA 6th 1945). These cases add little to *Ashland Oil Co., supra,* and are cited apparently as additional authorities for the general proposition that substance governs over form and closely related transactions should be viewed as a whole. With these general statements Appellees have no dispute.

The "well established rule" which the Government claims requires reversal of the Trial Court is known in the tax field as the "Kimbell-Diamond rule," deriving its name from the decision of the Tax Court in *Kimbell-Diamond Milling Co. v. Commissioner,* 14 T.C. 74. Its authority rests upon several decisions of the Tax Court and upon several decisions of the United States Court

of Appeals for the Fifth Circuit.[8] Insofar as we have been able to find, this rule has never been applied by this circuit. The rule has already injected much confusion into the tax law, with the Government alternatively espousing[9] but more frequently opposing its application.[10] It is by no means clear just what is the Kimbell-Diamond rule.

To define the so-called "Kimbell-Diamond rule," it is, as usual, more profitable to examine what the Tax Court did rather than to give undue weight to the language by which the end result in the decided cases was achieved. It might also be helpful to recount the economic background of the *Kimbell-Diamond* cases.

The economy has for some years been in an inflationary spiral. Many corporations owned depreciable physical assets having market values far in excess of their book basis. Other business organizations, desiring to acquire these physical properties for integration into their own activities were frequently forced to buy the stock of their corporate owners in order to acquire them.

Almost invariably the corporation whose stock was to be so acquired was stripped down to the desired physical assets prior to the sale of its stock. Upon acquisition of the stock the properties were promptly integrated by

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[8] *Kimbell-Diamond Milling Co. v. Commissioner, supra; Kanawha Gas and Utilities Co. v. Commissioner, supra; Snively v. Commissioner, supra.*

[9] *Kimbell-Diamond Milling Co. v. Commissioner, supra; Cullen v. Commissioner, supra; John Simmons Co. v. Commissioner,* 25 T.C. 635.

[10] *Ashland Oil and Refining Co. v. Commissioner, supra; H. B. Snively v. Commissioner, supra; Koppers Coal Co. v. Commissioner, supra; Kanawha Gas and Utilities v. Commissioner, supra; Trianon Hotel Co. v. Commissioner,* 30 T.C. 156 (1958).

one of several means into the operations of the acquiring corporation. The Commissioner usually contended that under the corporate adjustment provisions of the 1939 Code[11] the acquiring corporation could claim as its basis for depreciation and depletion only the basis of these assets on the books of the old corporation. The taxpayers claimed that as a practical matter they had purchased the stock of the old corporation solely for the purpose of acquiring these properties and therefore their true economic cost was the price they paid for the stock.

With this background let us consider *Koppers Coal Co. v. Commissioner,* 6 T.C. 1209, which is sometimes considered the forerunner of Kimbell-Diamond. Actually *Koppers Coal, supra,* is far more closely related to *Ashland Oil, supra.* The predecessor of Koppers, Massachusetts Gas, had sought by negotiations extending over a number of years to acquire for use in its own operations certain coal properties owned by three corporations. These negotiations proceeded to the point that formal contracts were drafted for the purchase of these properties. At the last moment the selling corporations countered with a proposal to sell their stock to Massachusetts. The selling corporations were stripped to the coal mining properties which were desired by Massachusetts and after being so stripped their stock was purchased by Massachusetts for $7,600,000.00. Unfortunately for Massachusetts these coal properties were carried on the books of the old corpora-

[11]This inequitable situation has largely been remedied by Sec. 334(b)(2)(B) of the 1954 Code.

tions at only $3,525,000.00. Koppers, the successor of Massachusetts, by a series of mergers and liquidations acquired these coal properties and integrated them into its own operations. Koppers used as its basis for claiming depletion its cost of the stock of the old corporations of $7,600,000.00. The Commissioner asserted that these properties had been acquired as result of the liquidation of subsidiaries and that the proper basis to Koppers was the remaining basis of these assets on the books of the liquidated corporations, or $3,525,000.00. Koppers contested this determination in the Tax Court relying upon *Ashland Oil, supra.* The Commissioner, as he had done in Ashland Oil, vigorously opposed application of the *Ashland* principles. However, the Tax Court held in favor of Koppers in an opinion which states in part at pages 1217 and 1219:

> "Petitioner argues that its predecessor, Massachusetts Gas Companies, at no time had planned to invest in the stock of the six West Virginia companies and that its sole purpose was to acquire the physical coal properties and leases belonging to those companies and to place the ownership of these properties in a wholly owned subsidiary organized by it to operate them.
>
> * * *
>
> "In the present case the facts supporting the position of the petitioner go far beyond those relied on by petitioner in *Commissioner v. Ashland Oil & Refining Co., supra.* Here it is conclusively established that the original intention of the petitioner was to acquire only the physical properties of the six coal companies. And the conditions of the contract under which the stock was acquired, together with the action of petitioner subsequent to its ac-

> quisition, compel the conclusion that the original plan was unchanged. Thus, we see that, although the stock of the six corporations was acquired, these corporations were first stripped of all their properties except the physical assets desired by the purchaser. Not only was this done, but the selling stockholders assumed all corporate liabilities of every kind arising through anything transpiring prior to the sale."

As in the *Ashland* case, the Tax Court emphasized that the sole purpose of the stock purchase was to acquire specific physical properties and to use those properties in the business of the acquiring corporation and that the so-called purchase of stock was a sham. None of these factors are here present.

The leading case is, of course, *Kimbell-Diamond Milling Co. v. Commissioner,* 14 T.C. 74. This case attracted wide attention and gave its name to the rule here under discussion for two reasons. The first reason is that in *Kimbell-Diamond* the Tax Court went somewhat beyond *Ashland Oil, supra.* The second reason is that the Government, after vigorously opposing application of the integrated transaction doctrine to corporate liquidations and reorganization base problems for many years, found it to its advantage in this unusual case to espouse it.

The plant of the Kimbell-Diamond Milling Company was completely destroyed by fire. The loss being covered by insurance, Kimbell-Diamond set out to buy or build another plant. By fortunate circumstances a plant belonging to Whaley Mill & Elevator Company adapted for use by Kimbell-Diamond was located. The opera-

tions of Whaley did not appear to have been particualrly successful. Whaley was willing to sell. By a resolution dated December 26, 1942 the board of directors of Kimbell-Diamond, after reciting the urgent need to replace its mill, the availability of the Whaley plant and its suitability for use by Kimbell-Diamond, authorized purchase of the outstanding stock of Whaley for $210,000.00. Immediately after this purchase Whaley was liquidated and operation of the mill taken over by Kimbell-Diamond.

The man bites dog feature of this case arises from the fact the book value of the mill so acquired was $314,715.69. Since the funds Kimbell-Diamond used to purchase the stock had been in part an insurance windfall, the cost to it of these shares was only approximately $139,000.00. Kimbell-Diamond, in reliance upon the general rule that the liquidation of a subsidiary is not a taxable event, claimed as its basis for depreciation and other purposes the basis of the mill on Whaley's books. The Commissioner, after opposing the idea for many years, found it to its advantage to claim that the proper basis was the actual cost to Kimbell-Diamond of the stock it had purchased solely in order to acquire the mill. The taxpayer contested this determination in the Tax Court which held in favor of the Commissioner, stating, at page 80:

> "It is inescapable from petitioner's minutes set out above and from the 'agreement and program of complete liquidation' entered into between petitioner and Whaley that the only intention petitioner ever had was to acquire Whaley's assets."

It is important to observe that when the Tax Court

speaks of "assets" and the singleness of Kimbell-Diamond's purpose in acquiring "assets," the reference is to a specific physical property and not assets in the general sense. It is also important to note that this property was incorporated in the business of the acquiring corporation. The Tax Court also considered the transaction as essentially the purchase of assets for only the limited purpose of arriving at a proper base for depreciation. *Kimbell-Diamond* is by no means authority for the broad statement of the rule made in the Government's brief.

The next case cited by the Government is that of *Ruth and Charles Cullen v. Commissioner,* 14 T.C. 368. Since 1921 Charles Cullen had engaged in the business of manufacturing artificial limbs. After 1931 this business was conducted by Charles C. Cullen & Co., a corporation, Cullen being one of four stockholders and owning one-quarter of the stock. Friction arose between the stockholdesr with the result that in 1943 Cullen purchased the stock of the other stockholders for approximately $31,000.00. On the same day he acquired the stock he dissolved the corporation, distributed the assets to himself and thereafter operated the business as a sole proprietorship. The assets of the corporation had a fair market value at the time of such distribution amounting to only approximately $23.000.00. Cullen claimed a loss on his 1943 return in the amount of approximately $8,000.00, representing the difference between the cost of his shares and the fair market value of the assets distributed to him. The Commissioner disallowed this loss on the ground that Cullen purchased a going concern having good will in addition to physical assets.

Cullen contested the Commissioner's determination in the Tax Court. The Tax Court disallowed the loss. However, in so doing it rested its decision, because of uncertainty as to whether the good will belonged to Cullen or the corporation, not upon the grounds urged by the Government but upon a somewhat curious application of the Kimbell-Diamond rule. The opinion of the Tax Court states in part, at page 373:

> "The petitioner knew the value of the corporation's assets before he offered to buy the remaining stock. . . . The petitioner's purpose was not to buy their stock as such. It was to buy up the business and the right to operate it as his own without interference from the former majority stockholders and without obligation to continue paying to them what he regarded as more than their rightful share of the earnings of the business. . . . Petitioner's purpose in buying the stock was to liquidate the corporation so that he could operate the business as a sole proprietorship. The several steps employed in carrying out that purpose must be regarded as a single transaction for tax purposes.
>
> "The petitioner paid more than the book value or fair market value of the assets in order to purchase the stock without delay and without increasing the already present strain on the personal relations of the stockholders. After acquiring the stock and dissolving the corporation pursuant to his plan, he had neither more nor less than he had paid for."

The difficulty we have in applying the Kimbell-Diamond doctrine to the *Cullen* case is that Cullen's purpose in purchasing stock was not the acquistion of assets, but rather to get the other stockholders out of his hair. However, again we observe Cullen utilized the

property acquired in his own business. It seems that what the Tax Court really said is that Cullen acquired a going business, the value of which he well knew and that after liquidation he had no more nor no less than that for which he had bargained. The result seems reasonable.

In *H. B. Snively v. Commissioner,* 19 T.C. 850, the Tax Court squarely faced the necessity for prescribing definite limits to the Kimbell-Diamond rule and as a side issue faced the other side of the Cullen coin. These two interesting facets of the *Snively* case can best be dealt with separately.

Early in 1943 Snively solely and expressly for the purpose of acquiring an orange grove purchased the outstanding stock of Meloso, its corporate owner. For several reasons Snively was unable to effect a dissolution of Meloso until December of 1943. Before the dissolution of Meloso was effected the 1943 orange crop was sold. Snively reported the sizeable proceeds from this sale as personal income, 1943 being an excess profits tax year. The Commissioner determined that this income belonged to Meloso and proposed assessment of very substantial corporate excess profit taxes. Snively contested this determination in the Tax Court.

In the Tax Court Snively took exactly the same position the Government takes here, arguing on the basis of *Ashland Oil, supra,* and *Kimbell-Diamond, supra,* that there is "an established rule that a purchase of corporate stock for the purpose of acquiring corporate assets through liquidation of the corporation is to be treated as a purchase of the corporate assets." Logically, of

course, if Snively's purchase of the stock of Meloso is to be treated for every purpose as a purchase of assets as the Government brief contends, the corporate entity would be disregarded and the proceeds from the sale of the 1943 crop would, of course, have been income to Snively. The Tax Court ruled in favor of the Commissioner, making it clear that a purchase of stock for the purpose of acquiring assets through liquidation will be considered as a purchase of assets for only quite limited purposes. The opinion states at page 858:

> "The petitioner argues, in effect, that this purchase of the stock and the succeeding moves to liquidate Meloso in some way incapacitated Meloso from earning, receiving, or being taxable with income from and after the date of the stock purchase. His main reliance is on *Commissioner v. Ashland Oil & R. Co., supra.* . . . We do not understand that case, which will be discussed later, to stand for such a proposition and find no merit in this argument. The stock purchase coupled with the intent to dissolve the corporation and the taking of some steps to that end, in our opinion did not *ipso facto* either destroy the existence of the corporation as a taxable entity or permit the petitioner to appropriate as his own income which would otherwise be taxable to the corporation."

Snively, urging, as does the Government here, that a purchase of stock for the purpose of acquiring assets through liquidation is tantamount to a purchase of assets, appealed the decision of the Tax Court against him to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, 219 F.2d 266 (1955) affirmed the Tax Court, holding at page 268:

> "When petitioner determined to acquire the

> stock of Meloso in order to get the grove on liquidation he was, of course, aware of the technical and substantial differences between the acquisition of the stock and the acquistion of the property. He now stands in the position of asserting that so far as relates to the sale of the bulk of the 1943 crop there was no difference.... We hold the income was that of Meloso. . . . "

The decisions of both the Tax Court and the Fifth Circuit in the *Snively* case, *supra,* illustrate the dangers of so broad a statement of the Kimbell-Diamond rule as is here urged by the Government and the necessity for confining the rule to the limited situations in which it has been applied.

The incidental issue in the *Snively* case, *supra,* also involved the Kimbell-Diamond rule. Snively, as has been mentioned, undertook negotiations with the stockholders of Meloso, a Florida corporation, for the purpose of acquiring a citrus grove owned by Meloso. Because of tax considerations the stockholders refused to sell the grove but offered to sell Snively their stock for $110,000.00. In March of 1943 Snively purchased the outstanding stock of Meloso. Necessary delays prevented the liquidation of Meloso until December 31, 1943. The fair market value of the grove at the time it was conveyed to Snively upon liquidation was slightly in excess of the cost basis of his shares. Snively first reported this gain as a long-term capital gain. The Commissioner claimed it was a short-term capital gain and later the taxpayer claimed no gain at all had been realized. On this point the Tax Court held in favor of Snively.

It is important to observe (1) that Snively's sole interest was a specific physical property, and (2) that Snively used this property in his own business.

Kanawha Gas and Utilities Co. v. Commissioner, 214 F.2d 685 (CA 5th, 1954) cited by the Government as authority for a rule of the breadth urged by the Government, is almost identical with *Ashland Oil, supra.* A predecessor of Kanawha, Anderson Development Company, was interested in 132 gas wells located in Lincoln County, West Virginia, owned by eight corporations. Anderson retained geologists and engineers to survey these gas properties and as a result of such survey entered into negotiations for their purchase. The corporations owning them, for tax considerations, refused to sell these properties but offered to sell their outstanding shares to Anderson. Prior to the sale of their shares to Anderson these corporations were stripped of their other assets and liabilities, leaving only the specific oil and gas properties desired by Anderson. Immediately after purchase of the outstanding stock of these stripped companies, Kanawha, the assignee of Anderson, proceeded to integrate them into its operations. These transactions were accomplished in the summer of 1929. However, legal title to these properties remained in the eight corporations until December, 1929. For the year 1929 Kanawha and these corporations filed consolidated returns. In 1941 and 1942 a substantial portion of these gas properties was sold. Kanawha used as its basis for computing its gain the cost to it of the stock of the eight stripped corporations. The Commissioner insisted their base was their book value in the old corporations.

Kanawha appealed the Commissioner's determination to the Tax Court. The Tax Court, in 19 T.C. 1023, held in favor of the Commissioner, distinguishing *Kimbell-Diamond, supra,* by the fact Kanawha and these eight corporations had filed consolidated returns for 1929.

From this adverse decision Kanawha appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, 214 Fed. 685, reversed the Tax Court, holding that the filing of consolidated returns was insufficient reason for distinguishing the facts from the *Kimbell-Diamond* case, *supra,* and pointing out that the facts are almost identical with those of *Ashland Oil, supra.* The *Kanawha* case presents, of course, all the classic factors requisite for application of the Kimbell-Diamond rule, *i.e.*:

1. A sole purpose of acquiring specific physical properties;

2. Integration of the acquired properties into the business operations of the acquiring corporation; and

3. Using the true economic cost of such assets as their base for tax purposes.

The remaining case cited in the Government's brief as authority for the broad statement of the Kimbell-Diamond rule is *Montana-Dakota Securities Co. v. Commissioner,* 25 T.C. 408. This case is almost identical with Kimbell - Diamond. Montana - Dakota's predecessors were interested in acquiring certain public utility properties in the Dakotas owned by Dakota Public Service Company, a subsidiary of United Public Utilities Company, a holding company. Dakota-Montana's predeces-

sors, knowing that United had been ordered by the Securities and Exchange Commission to divest itself of these properties, entered into negotiations for their purchase. United would not agree to a sale of assets by Dakota. Therefore, Montana-Dakota's predecessor agreed to purchase the stock of Dakota with the understanding that after such purchase Dakota would be liquidated and the properties consolidated into the operations of Montana-Dakota. After securing the necessary approval of various regulatory agencies, Montana-Dakota did purchase the stock of Dakota, liquidated Dakota and integrated such properties into its operations. Montana-Dakota used as the basis for depreciation the amount it paid for the stock of Dakota. The Commissioner contended these transactions came within the ambit of the non taxable reorganization provisions of the Code and that their proper basis was their old book value. Montana-Dakota contested this determination of the Commissioner. The Tax Court ruled in favor of Montana-Dakota, stating at page 415:

> "It is quite clear from the record that, whether petitioner negotiated specifically for the assets of the two corporations or not, its primary, in fact its sole purpose, was to acquire the corporate assets through the purchase of the stock and the immediate liquidation of the corporations, to the end that it might integrate the properties into its directly owned operating system."

All the cases cited in the Government's brief present fact patterns which are quite different from the one now before this Court. In practically every one of these cases there were prior negotiations between the purchaser and the selling stockholders looking toward the purchase

of specific physical properties. In all of these cases the purchasers' sole purpose was to acquire specific physical properties. In all of these cases the properties acquired were integrated into the business of the purchaser. In almost all of these cases the corporation whose stock was acquired was, prior to the sale of its stock, stripped so that, actually, the purchaser acquired only these specific physical properties. Almost without exception, the only question presented was whether the basis of these properties in the hands of the purchaser was their value on the books of the old corporation or the price the purchaser actually paid in order to acquire them. In summary all the cases cited by the Government have really held is that where the stock of a corporation is purchased solely for the purpose of acquiring specific physical properties and such assets are thereafter distributed to the purchaser through liquidation for integration into the business of the purchaser, the basis of such properties in the hands of the purchaser is the price paid for such stock.

These cases are by no means authority for the proposition advanced by the Government that every purchase of the outstanding stock of a corporation followed by liquidation is to be treated for all purposes as though the transaction were a purchase of assets. There are, it would appear, two basic fallacies in the Government's statement of the Kimbell-Diamond rule. The first is that in order for the rule to be applicable a great deal more is required than a general interest in the assets of the corporation. The second fallacy is the assertion the purchase of stock should be treated for all purposes as a purchase of assets. The cases cited have held that for

only certain limited purposes the purchase of stock will be treated as a purchase of assets. Indeed the Fifth Circuit makes amply clear in the *Snively* case, *supra,* for most purposes such transactions will be treated as a purchase of stock and a liquidation.

The Tax Court in three recent cases not mentioned in the Government's brief has gone to considerable effort to point out that the Kimbell-Diamond rule must be strictly limited to the facts of the cases heretofore decided and made it quite clear that these cases are in no wise authority for so broad a statement of the rule as is urged upon this Court by the Government.

The first such recent case pointing out the narrow limits of the Kimbell-Diamond rule is *John Simmons Co. v. Commissioner,* 25 T.C. 635. John Simmons Company, a New York corporation, had been in the plumbing supply business for many years. In about 1934 it experienced financial difficulties soon complicated by the death of Simmons, the principal stockholder. Two of the old employees resolved to buy the business and approached the corporation's bank for financial assistance in this undertaking. At the insistence of the bank a New Jersey corporation of approximately the same name was formed. As soon as the outstanding stock of the old New York company was acquired by these employees a merger was effected in which the New Jersey corporation was the survivor. For tax purposes the surviving corporation used the value of the assets so acquired shown on the books of the old corporation, which was substantially higher than the price the employees paid for its stock. The Commissioner, relying upon

Kimbell-Diamond, supra, determined that the transaction should be treated as though the acquiring corporation had purchased assets with the result that the proper basis for these assets would be the price paid for the stock of the old corporation. The corporation contested the Commissioner's determination in the Tax Court. The Tax Court held that the Kimbell-Diamond rule was not applicable. The opinion of the Tax Court at pages 641 and 642 is especially interesting and is quoted at some length:

> "Counsel for the respondent argues that under decided cases involving similar circumstances there was here in substance a purchase by the petitioner of the assets of the New York company. He cites the cases of *Commissoner v. Ashland Oil & Refining Co., supra; Koppers Coal Co., supra; Kimbell-Diamond Milling Co., supra;* and *Kanawha Gas & Utilities Co., supra.*
>
> "Our examination of the cases cited by the respondent convinces us that the prinicple enunciated therein was intended to be and should be limited to the peculiar situations disclosed by the facts in each of those cases and should not be extended to a case such as this, where the evidence establishes a wholly different origin and reason for the patterns of the transactions. In each of those cases it appeared that an existing corporation had as its primary purpose or indeed its sole purpose, the purchase of a particular asset or a group of assets of another corporation, but was forced by circumstances beyond its control to effect the acquisition through the channels of first acquiring stock and then liquidating the subsidiary. . . .
>
> "Here the testimony shows that it was the desire of the individuals who were then in active conduct

of the business of the New York company to continue that business in corporate form. Neither they nor the petitioner had as their sole or primary motive the acquisition of particular assets. Neither the individuals nor the petitioner at any time negotiated for the acquisition of any of the assets of the New York company. Rather, the purpose and the negotiations were to acquire stock and thereby acquire control of the company and its business."

The Tax Court in the recent case of *Trianon Hotel Co. v. Commissioner,* 30 T.C. 156 (1958) makes it extremely clear that the Kimbell-Diamond rule is far more limited than its statement in the Government's brief and is not to be extended beyond the specific situations to which it has already been applied. Trianon purchased all the outstanding stock of Allis, another corporation, for $2,342,925.00. Immediately upon acquiring the outstanding stock of Allis, Trianon dissolved Allis and distributed to itself the assets of Allis. These assets had a book value of $1,067,481.29. The minutes of the board of directors of Trianon authorizing the purchase of these shares set forth very plainly that the purpose of acquiring the outstanding stock of Allis was to liquidate it in order to acquire its assets. After so acquiring the assets of Allis, Trianon used as its basis for depreciation the price it had paid for the stock of Allis, or $2,342,925.00. Upon audit the Commissioner determined that these transactions constituted a tax free merger and under the applicable statutes and regulations the proper basis for such assets was their basis on the books of Allis.

In reliance upon the cases cited in the Government's brief, Trianon contested this determination of the Com-

missioner in the Tax Court. Interestingly enough the opinion of the Tax Court in favor of the Commissioner makes the same distinction concerning the applicability of the Kimbell-Diamond rule as did the Trial Court, pointing out that the necessary prerequisite to applicability of the rule is the sole and specific purpose of acquiring physical properties for integration into the business of the purchaser and that this requirement is not met where the acquisition of assets is incident to some other purpose. Since the Tax Court reached the same conclusion with respect to the Kimball-Diamond rule as did the Trial Court, the opinion of the Tax Court is quoted at some length:

> "If the petitioner is to prevail, it must be established that the purchase of Allis Corporation's stock, and the subsequent liquidation of Allis Corporation, constituted, in substance, one integrated transaction in which Trianon intended to purchase Allis Corporation's assets. See *Commissioner v. Ashland Oil & R. Co., supra; Koppers Coal Co., supra; Kimbell-Diamond Milling Co., supra; Kanawha Gas & Utilities Co. v. Commissioner, supra; Montana-Dakota Utilities Co., supra.*
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> "It is not necessary for us to review the facts and conclusions of the above-cited cases. In each case it appears that a corporation had as its primary purpose the purchase of the assets of another corporation, but was forced by the selling shareholders to effect the asset acquistion by first acquiring stock and then liquidating the acquired subsidiary. In the cases cited, an important factor was that the acquiring corporation had no intention of merely continuing the business of the old corporation in a new corporate form. This court has

held that the principles enunciated by the foregoing cases *do not apply when the acquiring corporation does not intend to integrate the acquired assets into its own operations.* (Emphasis supplied) *John Simmons Company,* 25 T.C. 635.

"Upon a careful examination of the entire record, we are compelled to conclude that Trianon did not have as its primary purpose in purchasing Allis Corporation's stock the acquisition of the assets of that corporation. It is true, as Trianon contends, that the minutes of its board of directors' meeting on December 5, 1950, authorized the purchase of Allis Corporation's stock and clearly set forth an intent to subsequently liquidate Allis Corporation to acquire the assets. It is true also that Trianon did not deviate from such expressed intention. . . .

" . . . both Woolf and Shanberg (directors of both corporations) expressed a desire to convert their stock into cash or securities in order to put their estates into a more liquid condition. Woolf, in his testimony, agreed that he wished to get his estate more liquid so that it could meet possible inheritance and estate tax liabilities. . . . Woolf also stated that Shanberg was concerned about the liquidity of his estate.

* * *

"The above mentioned facts create a strong inference that Trianon's board of directors considered purchasing Allis Corporation's stock in order to convert such stock into liquid assets, without depriving the majority shareholders of their control over the operations of the latter corporation. Such an intention suggests that the purchase of stock was not to acquire assets, but to supply certain of Allis Corporation's majority shareholders

with readily available funds which would not be depleted by a dividends tax.

"In making our determination, however, we rely mainly on the conclusion that Trianon did not acquire a group of assets when it purchased Allis Corporation's stock and subsequently liquidated that corporation, but a separate, going business."

Thus, despite clear evidence of an intention to acquire assets through the purchase of Allis' stock and liquidation the Tax Court held the Kimbell-Diamond rule is not applicable for three reasons: (1) The motive for the transactions was not solely to acquire specific physical properties;[12] (2) by the purchase of stock the acquiring corporation secured not naked physical assets but a going business;[13] (3) the purchaser did not incorporate the acquired assets into its own business.[14]

The most recent case decided by the Tax Court refuting the rule as here urged by the Government is *Conte Equipment Corp. v. Commissioner,* T.C.M. 1958, No. 171. In this case the Tax Court again emphasizes that in order for the Kimbell-Diamond rule to be applicable a great deal more is required than an acquisition of the stock of a corporation in order to acquire its assets (in a general sense) and the subsequent distribution of those assets to the purchaser through liquidation.

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[12]Mattison's motive was, of course, to make a profit. The health of Westcott, his concern for the liquidity of his estate, and the concern of the stockholders as to the future of the company upon the death of Westcott were the factors motivating the sellers (R. 45, 79, 80).

[13]Mattison, through his purchase of stock, acquired a highly successful, going business (R. 33, 44).

[14]Mattison had no interest in the assets of the Westcott Oil Company except insofar as they were part of his plan to realize a profit through liquidation (R. 45).

Conte Equipment Corp., Conte Investment Company and Conte Eastwood, Inc., were separate corporations owned by members of the Conte family. On January 8, 1953, Conte Equipment purchased all the outstanding stock of the last two corporations for about $300,000.00. The principal if not only assets of Eastwood and Investment were a block of downtown real estate carried on their books at approximately $225,000.00. In March Conte concluded negotiations for the sale of these properties to a third party for $320,000.00. Investment and Eastwood were liquidated and these assets distributed to Conte, who immediately sold them at the price just mentioned. Conte reported a gain on this sale in the amount of $20,000.00, representing the excess of the price at which the properties had been sold over the cost to it of the stock acquired in order to secure them. The Commissioner, applying the liquidation of a subsidiary provisions of the Code, determined that the proper basis for this block of real estate was $225,000.00, its basis on the books of the dissolved corporations. Conte, in reliance upon the cases cited in the Government's brief, made the same argument as the Government makes here that the foregoing transactions should be treated as a purchase of assets by Conte. The Tax Court in denying relief to the taxpayer held the Kimbell-Diamond rule was not applicable because the objective for the purchase of stock and liquidation was not solely the acquisition of specific physical assets. Rather as here, the purpose was to make a profit.

In summary, it appears the Kimbell-Diamond rule is merely that where the stock of a corporation is acquired solely for the purpose of acquiring certain phys-

ical properties which are incorporated into the business of the purchaser through liquidation the basis of such properties in the hands of the purchaser shall be the cost to him of the stock he purchased in order to acquire them. No case has been cited in which the Kimbell-Diamond rule has been used as authority for disregarding the annual accounting concept, or for the purpose of avoiding application of the principle of recovery of cost in successive corporate distributions in liquidation, or for the purpose of taxing income to a cash basis taxpayer in a year other than that in which it is received. The cases cited contain no suggestion that the rule should be extended to these lengths.

The cases relied upon in the Government's brief were effectively urged upon the Trial Court in two excellent briefs filed by the Tax Division. They were cited, discussed and searchingly analyzed in the Trial Court's memorandum opinion (R. 828). After careful consideration of these cases the Trial Court concluded that the Kimbell-Diamond rule is not nearly so broad as urged in the Government's brief and that to apply the Kimbell-Diamond rule to achieve the result sought by the Government in this case would require an extension of that rule very substantially beyond the decided cases and beyond the limits to which it has been confined by its originator, the Tax Court (R. 27, 28). The Trial Court declined to make this extension. In view of the later authorities this denial by the Trial Court seems extremely well founded and merits affirmation.

3. The finding of the Trial Court that Mattison in substance purchased the stock of the Westcott Oil Company and realized a profit in 1953 from its complete liquidation is essentially a finding of fact amply supported by the record

Putting aside for the moment the differences between the parties as to a proper statement of the Kimbell-Diamond rule, it is nothing more nor less than another application of the rule that substance must govern over form.[15] However, as the Trial Court points out (R. 28) in a given situation what is substance or, stated another way, whether transactions are so integrally related they should be considered as one is a question of fact.[16] This court had recent occasion to make these observations in the case of *Jacobs v. Commissioner*, 224 F. 2d 412 (1955). In this case the Tax Court found as a fact that a series of transactions effected by Jacobs were in substance the sale of land. Jacobs appealed the decision of the Tax Court against him to this Circuit. This Circuit affirmed the decision of the Tax Court in a rather brief opinion, stating at page 413:

> "Whether for tax purposes several acts constitute separate and distinct transactions or are integrated steps in a single transaction is a question of fact."[17]

In the final analysis, whether the transactions here in

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[15] *Kanawha Gas and Utilities Co. v. Commissioner, supra,* p. 691; *Kimbell-Diamond Milling Co. v. Commissioner, supra,* p. 80; *Commissioner v. Ashland Oil & R. Co., supra,* p. 59.

[16] *United States v. Cumberland Public Service Co.,* 338 U.S. 451 (1950); *Commissioner v. Court Holding Co.,* 324 US.. 331 (1945).

[17] See also: *Heller v. Commissioner,* 147 F.2d 376 (CA 9th 1954); *Houck v. Hinds,* 215 F.2d 673 (CA 10th 1954); *Kolkey v. Commissioner,* 254 F.2d 51 (CA 7th 1958); *Spirella Co. v. Commissioner,* 155 F.2d 908 (CCA2d 1946).

question are in substance a purchase of the outstanding stock of a corporation followed by the liquidation of that corporation or simply a disguised purchase of assets is a question which, if a jury had been impanelled, would have been submitted to it for a finding of fact.[18] This being true it follows that such finding of fact by the Trial Court should not be disturbed unless it is clearly erroneous.[19]

This case was decided after a trial extending about two days. Five witnesses were called by Mattison; three witnesses were called by the Government. Cross examination by the Government was extensive. Twenty-seven voluminous exhibits were received in evidence. A transcript of the record was prepared (R. 218). The matter was taken under advisement by the Trial Court (R. 217, 218). Several written briefs were submitted by both parties which the Trial Court was generous enough to term excellent (R. 27). After carefully considering the evidence the Trial Court prepared a penetrating memorandum opinion (R. 21 through 31). Later it entered detailed findings of fact (R. 31 through 47).

After carefully considering all the evidence the Trial Court found that the substance of the transactions here involved was identical with their form (R. 43). This substance was that Mattison purchased the outstanding stock of the Westcott Oil Company from the selling stockholders not because of any special interest in acquiring for himself the physical assets of the Company but because he hoped over a period of time to liquidate

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[18]*Georgia Pacific Corp. v. Commissioner*, 264 F.2d 161 (CA 5th 1959).

[19]*McCaughn v. Real Estate Title and Trust Co.*, 297 U.S. 606 (1935).

it at a profit (R. 45). The Trial Court further found that Mattison sold the operating assets of the Company in 1952 at a profit in the amount of $23,276.29 which he correctly reported in his returns of that year (R. 40); that the liquidation of the Company proceeded as promptly as was reasonable under the circumstances (R. 43) and that upon completion of this process of liquidation in 1953 Mattison received in 1953 a gain in the amount of $102,823.49, which was taxable to him in 1953. The exhibits and testimony received in evidence permit of no other conclusions.

The contracts between Mattison and the selling stockholders clearly describe the subject matter of sale as stock (Exhibits H, I). The records of the First Security Bank of Idaho clearly describe the subject matter of the transaction as a purchase and sale of stock (Exhibits W, X, Y). All the formalities incident to a sale and transfer of stock were complied with (Exihibit M, R. 43). Mattison testified he purchased stock (R. 126 through 133). Witnesses Westcott, Dollard and Eberle testified that they sold Mattison stock, not assets (R. 108, 187, 214). The selling stockholders had never negotiated with Mattison or anyone else for sale of assets (R. 70 through 112). The price for which this stock was purchased by Mattison was fixed by the selling stockholders more or less at a figure they had picked out of the air as the value of their shares plus their tax cost (R. 84 through 87). The price Mattison paid for the shares was not based upon any appraisal or evaluation of the assets and was unrelated to the assets of the Company except to the extent the price of any stock is to some degree influenced by the value of the assets behind

it (R. 76 through 113). The price at which Mattison purchased the shares in question took into account the earning history of the Company, its dividend record, its going concern value and good will (R. 112, 113).

Mattison by the purchase of these shares acquired not only the assets of the Company but all its liabilities including the liability of $310,000.00 to the First Security Bank of Idaho, known and unknown liabilities of taxes and liabilities of all future claims of every nature which might be made against the Company (R. 136, 141). Mattison acquired the cash of the Company, its inventories, accounts receivable, accounts payable. In short Mattison acquired every right and liability and every advantage and disadvantage which goes with the purchase of stock (R. 44). There were no side agreements between Mattison and the selling stockholders which would distinguish the transaction between them from an ordinary purchase of stock (R. 93, 94, 145). At the time Mattison purchased the outstanding stock of the Westcott Oil Company there was considerable uncertainty as to whether the Company could be liquidated at a profit (R. 135, 136, 157, 184). The record is quite clear that until the Company was completely liquidated Mattison had no control over its funds and made no use of those funds (R. 39, 91 through 93).

The Trial Court found that the transactions here in question were in substance a purchase of stock and a corporate liquidation and not, as the Government urges, a simple purchase and sale of operating assets concluded in 1952. In this finding of fact the Trial Court is supported by the overwhelming weight of the evidence and the finding should be affirmed.

4. Without disregarding basic statutes and rules of taxation, application of the Kimbell-Diamond rule would not achieve a result different from that reached by the Trial Court

The Government contends that Mattison in reality purchased the assets of the Westcott Oil Company from the other stockholders (Appellant's brief, pp. 13 through 25). For reasons well set forth in its memorandum opinion the Trial Court found otherwise (R. 21 through 31). As we have pointed out the Kimbell-Diamond rule is not applicable to the facts before us. However, even if we assume, *arguendo,* that the contention of the Government be true and Mattison in substance purchased the assets of the Westcott Oil Company, it by no means follows that Mattison, a cash basis taxpayer, can be taxed in 1952 upon a gain of $102,-823.49 which he never received or became entitled until May 12, 1953 or later. Certainly none of the Ashland Oil and Kimbell-Diamond cases are authority for the proposition that income may be taxed in a year other than that in which it is received.

There are some very hard, simple and undisputed facts which the Government's brief ignores and which sharply illustrate the inapplicability of the rules espoused by them to this case. During 1952 Mattison bought whatever we wish to call it, paying $1,352,-321.82. During 1952 he received from the sale of whatever we care to call it $1,379,275.18, incurring necessary expenses in the amount of $3,677.07. A certified public accountant testified during the trial that Mattison's 1952 gain on this transaction must, regardless of what the subject of the transaction might be, if accepted ac-

counting principles are followed, be computed as follows:

Received	$1,379,275.18
Expended	1,352,321.82
Gross Gain	$ 26,953.36
Expenses	3,677.07
Net Gain	$ 23,276.29 (R. 177 through 180).

This is exactly the amount reported on Mattison's return for 1952.

At the close of 1952, assuming he had spent not one cent of this gain, Mattison had only $23,276.29 more than he had when he started the year. The Government claims in all apparent sincerity that he should have paid taxes of $69,257.45 for 1952. Nowhere in the Government brief is there any suggestion as to how this could have been accomplished. This is but one of the bizarre results which would follow from not applying to the instant transaction the established rules which experience has dictated are essential in corporate liquidations.

The gymnastics of logic through which the Government asks the Court to follow them in order to achieve a result different from that reached by the Trial Court show remarkable imagination. The Government argues during the major portion of their brief that Mattison's sole purpose in the transactions now before the court was to acquire the physical assets of the Westcott Oil Company.[20]

[20]If it be true that the acquisition of physical assets was Mattison's sole purpose in purchasing the stock of the Westcott Oil Company, it follows necessarily that the entire purchase price he paid for the stock, or $1,352,321.42, was expended to acquire these assets. This leads us directly back to the result reached by the Trial Court.

Once having used the singleness of purpose argument in an effort to bring the facts within the ambit of the Kimbell-Diamond rule, the Government blithely casts it aside and argues that Mattison had two purposes in purchasing the outstanding stock of the Company. One was to acquire its physical assets. The other was to realize a profit at some future date through complete liquidation. But the Government then proceeds to rationalize that of the total amount he paid for the outstanding stock of the Westcott Oil Company Mattison paid $1,249,498.33 for the operating assets and paid $102,861.66 for the prospect of gain through eventual liquidation. This is, of course, just arithmetic sleight of hand to tax in 1952 the $102,861.66 which Mattison received between May and November of 1953. For it matters not one whit in result whether the funds he received in 1953 were added to his 1952 receipts or subtracted from his 1952 disbursements. The result is exactly the same.

The only fair inference from the evidence is that at the time Mattison purchased the remaining stock of the Westcott Oil Company there was no way of knowing that in the following year he would receive $102,861.66 or any amount upon final liquidation. There were real possibilities liquidation could have resulted in a loss (R. 136). A number of events could very easily have occurred between June 1952 and the final liquidation of the Company in 1953 which would have converted Mattison's venture into a disastrous loss (R. 136, 184). Yet if we follow the Government's rationale, Mattison incurred a tax liability of $69,257.45 from a sale of the physical assets on June 16, 1952 regardless of whether

the whole transaction resulted in a profit or loss. This is obviously untenable.

The Government admits, as it must, their position is that Mattison's 1952 taxes should be computed on the basis of "the fair market value of the other property which he received in cash or property in the following year (1953)" (App. Br. p. 15). In short the Government argues that Mattison's 1952 income tax liability must be computed on the basis of events which occurred in the middle of 1953.[21] The fact that tax liabilities for one tax period may not be determined by events occurring after the close of that period was put at rest by the Supreme Court of the United States in *Security Flour Mills v. Commissioner,* 321 U.S. 281. Security Flour Mills, a manufacturer reporting its income on the accrual basis, during the year 1953 collected from its customers certain processing taxes, the constitutionality of which tax was being contested in the courts. After termination of this litigation in favor of the millers the funds collected were returned to its customers. Most of the repayments were made in 1936 but some as late as 1937 and 1938. The Commissioner disallowed the deduction of the repayments which Security Flour Mills claimed on its 1935 returns on the grounds that these repayments were neither made nor properly accruable in that year. Security Flour Mills contested the Commissioner's determinations on the ground that while these amounts were not returned to their customers until after the close of 1935, it was necessary to take them into account in order accurately to reflect

[21]This court and most of the other circuits have decisively held that a taxpayer may not be given tax effect on distributions in liquidation until they are received (p. 11, *supra*).

1935 income. The Supreme Court of the United States in an opinion sustaining the Commissioner hewed strictly to the annual accounting concept and held that transactions must given tax effect only in the year in which they occur. The opinion of Mr. Justice Roberts state in part at pages 285 and 286:

> "But we think it was not intended to upset the well understood and consistently applied doctrine that cash receipts or matured accounts due on the one hand, and cash payments or accrued definite obligations on the other, should not be taken out of the annual accounting system and, for the benefit of the Government or the taxpayer, treated on a basis which is neither a cash basis nor an accrual basis, because so to do would, in a given instance, work a supposedly more equitable result to the Government or to the taxpayer.
>
> * * *
>
> "This legal principle (the annual accounting concept) has often been stated and applied. The uniform result has been denial both to Government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, . . . "

Probably no principle is more firmly stablished in tax law than the annual accounting concept.[22] However, the Government contends that the Trial Court erred because it refused to do exactly what these cases say may not be done, *i.e.,* account for in Mattison's 1952 taxable income funds which he did not either receive or become entitled until 1953.[23]

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[22]*United States v. Lewis,* 340 U.S. 590 (1951); *Dobson v. Commissioner,* 320 U.S. 489; and other cases cited in *Security Flour Mills, supra.*

[23]The Government's basic argument sometimes is the one Snively made

Often it is helpful in analyzing an argument to consider it in reverse. So let us assume complete liquidation of the Westcott Oil Company in 1953 resulted in a loss, could Mattison have taken this loss into account in computing his 1952 gain from the sale of physical properties? It is quite clear he could not have.

In *Roberta Pittman v. Commissioner*, 14 T.C. 449 Miss Pittman, in 1945, dissolved a wholly owned corporation, realizing a profit of approximately $21,000.00. In 1946 a tax deficiency in the amount of about $3,000.00 was assessed against the corporation. These taxes were paid in 1947 by Miss Pittman as transferee. Miss Pittman claiming credit for the $3,000.00 in taxes she paid after the close of 1945, reported her 1945 gain as $18,000.00. The Commissioner claimed the 1945 gain was $21,000.00 and the $3,000.00 tax payment could not be taken into account until 1947 when it was made. The Tax Court held in favor of the Commissioner, pointing out that a disbursement after the close of the taxable year could not be given tax effect. See also: *Arrowsmith v. Commissoner,* 344 U.S. 6 (1952) involving the question of whether such a loss in a subsequent year is an ordinary loss or a capital loss.

As authority for disregarding Secs. 41 and 42 of the Internal Revenue Code of 1939 and the authortiies heretofore cited, the Government cites a memorandum decision of the Tax Court, *Graves v. Commissioner,* 1952 T.C.M. No. 143. The *Graves* case is not in point.

The *Graves* case does not involve a purchase of stock,

in *Snively v. Commissioner, supra, i.e.,* that Westcott Oil Company should be disregarded as a corporate entity. Since the Company functioned as a *de facto* and *de jure* corporation until June 19, 1953 (R. 45) this argument does not seem tenable.

a liquidation or even the Kimbell-Diamond rule. Graves did not buy the stock of a corporation and acquire its properties through liquidation. Graves merely purchased an assorted group of properties including inventories, machinery and accounts receivable. Graves individually acquired title to all these properties at the time of his purchase. All the Tax Court held is that the $250,000.00 which Graves paid for these properties should be allocated between them on a different basis than Graves had done and that in making this allocation some account could be taken of the prices at which these properties were sold the following year.

The basic difference between the *Graves* case and the facts here is that in 1952 Mattison did not have title to or any ripened legal right to the property which he received the following year. These assets until May 13, 1953 belonged to the corporation and were subject to its debts. Obviously, no allocation of cost can be made to property until the purchaser becomes enitled to the property. The only possible circumstance under which the *Graves* case could be considered in point is for this Court to do exactly what the Fifth Circuit refused to do in the *Snively* case, *supra,* and what this Circuit refused to do in *Case v. Commissioner, supra, i.e.* disregard Westcott Oil Company as a corporate entity and consider Mattison as individually owning all the assets of the Company prior to the time they are distributed to him.

The *Graves* case is certainly not authority for using allocation of purchase price as a device for taxing income prior to its receipt which is what the Government

seeks to do here. The entire receipts from Graves' sales property in 1943 were not taxed to him in 1942 as the Government would do here. These sales were only used as evidence that these properties had some value in 1942. In the *Graves* case most of Graves' income was held to have been realized in 1943.

In the *Graves* case the Tax Court found it possible to make an allocation as between the cost of the various assets purchase as a lot. However, where a conglomerate lot of assets is purchased and it is difficult or impossible to allocate the purchase price as between the various items purchased, the courts have frequently, even in the case of straight purchases of physical assets, applied the recovery of cost principle. A typical illustration is *United Mercantile Agencies, Inc. v. Commissioner,* 23 T.C. 1105. United purchased a considerable quantity of notes, judgments and other assets from insolvent banks. No attempt was made at the time of purchase to allocate the amounts paid for specific items. Receipts were treated as return of capital until the total amount paid to the bank had been recovered. Thereafter all proceeds were treated as gain. The Commissioner insisted than an allocation of cost must be made and that the profit from the sale of each item be computed and reported in its year of sale. The Tax Court held against the Commissioner.

Even if the transaction before this court were a simple purchase of assets, which the Trial Court found it was not, there is no evidence in this record from which the Trial Court could have found, as the Government contends, that $102,823.49 of the amount which Mattison paid for the remainder of the stock of the Westcott

Oil Company was paid for the prospect of profit upon complete liquidation.

The only fair inference from the record is that any reasonable approximation of the eventual profit which it would be possible to realize upon complete liquidation of the Westcott Oil Company was impossible at the time Mattison purchased the remainder of its stock. Indeed at that time complete liquidation seemed more of a liability than an asset (R. 184).

VI. CONCLUSION

The cases relied upon by the Government all involve situations where the ordinary rules applicable to corporate adjustments would work an injustice, usually to the taxpayer, but in some instances to the Government. In most situations it was the simple fact a taxpayer could not claim depreciation on the price he had actually paid to acquire certain physical properties.

The Trial Court found as matters of ultimate fact that Mattison had in substance purchased the stock of the Westcott Oil Company and realized profit in 1953 from complete liquidation of the Company.

Application of the Kimbell-Diamond rule to these facts in order to achieve the result sought by the Government the Trial Court concluded would require an extension of that rule far beyond the limits to which it had been applied in the decided cases (R. 28). This extension of the Kimbell-Diamond rule beyond the decided cases the Trial Court refused to make. This being so, the Trial Court concluded that the ordinary statutes, Commissioner's regulations and cases relative to cor-

porate liquidations were applicable. Counsel for Appellees earnestly urge this circuit court not to extend the Kimbell-Diamond rule beyond its present limits and point out that an extension to the length urged by the Government would result in overruling long established precedents of this and other courts, disregarding basic Code provisions, and would in most instances result in the application to corporation dissolutions of rules quite unsuited for the determination of taxable income.

In every respect the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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No. 16,264

IN THE

United States Court of Appeals

For the Ninth Circuit

YOUNG AH CHOR,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellee.

On Appeal from the United States District Court for the District of Hawaii in Civil No. 1110.

APPELLEE'S ANSWERING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Rules

No. 16,264

IN THE

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APPELLEE'S ANSWERING BRIEF.

JURISDICTIONAL STATEMENT.

Appellee agrees with the jurisdictional statement set forth by Appellant on pages 1 to 2 of his Opening Brief.

STATEMENT OF THE CASE.

In 1951, Appellant and Young Ah Kwai applied for United States passports from the American consul at Hong Kong, B.C.C. (R-128, R-156). Appellant and Young Ah Kwai were both born in China, in Sun Mun

Tung Village (R-127, R-152), and resided in Hong Kong at the time of such application, although they claimed the Territory of Hawaii as their permanent residence (R-127, R-155).

Their applications were denied (R-134, R-156), and they thereafter commenced this action in the District Court of Hawaii.

At trial, Appellant and Young Ah Kwai maintained that they were the sons of Young Yick, who in 1950 had been adjudicated to be a United States citizen (R-36).

Young Yick (R-16), Young Ah Kwai (R-152) and Appellant (R-125) testified at trial. Their testimony was taken primarily through a government interpreter, the use of whom, as Appellant's counsel stated, "both sides prefer," and to whose use Appellant had no objection (R-34).

At various times during the trial, the interpreter's choice of Chinese words was corrected or questioned by Appellant's counsel (e.g., R-96 and 97, R-104), who appeared to be fluent in the same dialect as that used by the witnesses (R-126, R-205).

The use of the interpreter has given rise to Appellant's first specification of error (Opening Brief, p. 13), in that Appellant urges that the trial court may not evaluate the conduct and credibility of witnesses who testify, through an interpreter, in a language unfamiliar to the Court, although it does not affirmatively appear anywhere in the record that the trial court actually was unfamiliar with such language.

Witness Young Yick testified that Young Ah Kwai and Appellant were his sons. On cross-examination, and over continuing objection, Appellee was allowed to question Young Yick, for purposes of impeachment, as to discrepancies among present and prior statements made by him (R-71 through R-123).

Appellant's second specification of error alleges error by the trial court in allowing such impeaching cross-examination.

As a part of the defense, Appellee offered and read the duly taken deposition of Young Hon Sun (R-213), who had been born and reared in the same Chinese village as Young Ah Kwai and Appellant (R-215 and 216), where the witness had been a classmate of Young Ah Kwai (R-218). This witness and Young Ah Kwai are cousins (R-258 to R-260).

This witness knew and identified by photograph Young Ah Kwai's father as Young Yick (R-218 and 219), knew and identified by photograph Young Ah Kwai's brother, named Young Jip (R-219), and knew and identified their mother (R-220). Although this witness did not know whether there were other children born to that mother and Young Yick (R-221), he did know that Young Yick had other brothers (R-222 to R-226).

This witness knew Appellant (R-227) and identified him by photograph (R-230).

This witness knew Appellant to be the son of one of the brothers of Young Yick (R-227, R-230), rather than the son of Young Yick himself.

Certain of the answers presented by the deposition of Young Hon Sun were objected to by Appellant, and gave rise to Appellant's third, fourth and sixth specifications of error.

The testimony of deponent Young Hon Sun was strengthened by the testimony of Appellant's own rebuttal witness, Young Chung, whose statement was likewise taken by deposition (R-283).

Young Chung, who had been the chief of Sun Mun Tung Village (R-287) and likewise had been the Acting School Headmaster at that village, knew Young Ah Kwai (R-288), and knew that his father's name was Young Yick (aka Yick Cheung) (R-289).

Although this witness could identify Appellant's photograph (R-290), he became very nervous immediately thereafter, and would not give a direct answer when asked the name of Appellant's father (R-291).

The testimony given by Young Hon Sun, the Court believed to be the only credible evidence (R-21), and upon such testimony concluded that Young Ah Kwai was the son of Young Yick (R-23), and was therefore entitled to judgment declaring him to be a national of the United States (R-23).

The Court also found and concluded that the preponderance of the evidence had established that Appellant, the co-petitioner of Young Ah Kwai, was not the son of Young Yick (R-22 and 23).

This finding and conclusion by the Court has given rise to Appellant's fifth specification of error.

ARGUMENT.

SUMMARY.

Appellant failed to prove his case, because the trial court simply could not believe his witnesses, and because his rebuttal witness would not substantiate Appellant's claim.

Prior statements by a witness are legitimate cross-examination for purposes of impeachment.

The testimony of Young Hon Sun with regard to pedigree was properly admissible, both because he is related and because of the common community emphasis upon knowledge of pedigree among rural Chinese.

The findings of the lower court are not clearly erroneous.

POINT I. APPELLANT FAILED TO PROVE HIS CASE.

A. The Trial Court Could Not Believe Appellant or His Witnesses.

Appellant's case was built upon his own testimony, the testimony of his alleged father, Young Yick, and upon the testimony of Young Chung, the former village chief.

The trial court stated in oral decision that Appellant's testimony did not inspire confidence (R-19), commented upon the unreliability of Young Yick's testimony (R-15 and 16), and found that their testimony was not credible (R-21).

Appellant now maintains that the demeanor of those witnesses was unfairly judged, for the reason

that those witnesses were testifying in a foreign language. Appellant urges the proposition that demeanor, like language, must be translated.

Appellee agrees with Appellant that this is a novel proposition. Certainly, no cases have been found which relate to the proposition. This being true, Appellant has been reduced to arguing by analogy that the trial judge is, in a manner of speaking, a witness.

Appellant also contends that there may have been wrong interpretations in the translation, although no specific instances are cited or challenged.

Neither of these contentions have merit. *First,* as to the apparent demeanor of the witnesses, there can be no doubt that the trier of fact must accept the exhibited conduct of a foreign-language witness as being natural and intended, unless shown to be otherwise. The burden of showing otherwise is upon him who offers such witness, just as the offerer has the burden of providing the translation. Thus, if the witness scratches, the trier of fact naturally assumes that the witness itches; the burden is upon the offeror of such witness to show that "scratching," when translated, means "cross-my-heart," or that a tongue in cheek and a shifty eye, when translated, mean honesty of statement.

At trial, no such showing was made by Appellant or even suggested, and so the trial court took the demeanor of Appellant and his alleged father at face value.

Appellant seems to urge that the trial court was obligated to judge only the bare words of the wit-

nesses, as translated. But as this Court stated in *Nishikawa v. Dulles,* 235 F.(2d) 135 (9th Cir. 1956), at page 140,

> "The trier of fact need not accept the uncontradicted testimony of a witness who appears before it, and the demeanor of that witness may be such as to convince the trier that the truth lies directly opposed to the statements of the witness. . . . This rule is particularly true where the witness is interested in the outcome of the case. . . ."

Second, as to Appellant's contention that there "may" have been wrong interpretations in the translation, it need only be stated that the interpreter used at trial was so used with the express consent and preference of Appellant, that Appellant's own counsel appears on the record to be fluent in the particular foreign language, and that corrections and suggestions as to the interpretation were made by such counsel from time to time. Appellant or his counsel having failed to object or otherwise comment upon the remainder of the translation at trial, the conclusive presumption arises that the translation was correct.

B. Appellant's Only Disinterested Witness Would Not Support Appellant.

Young Chung, the remaining member of Appellant's testifying triumvirate, was called by Appellant to rebut the testimony of Young Hon Sun. Although Young Chung knew Young Yick, and knew that Young Ah Kwai was a son of Young Yick, the witness would do no more than identify Appellant by photograph. When asked (R-291) the name of Appellant's father, the witness did not answer the direct

question. Moreover, the witness was never thereafter asked the same, most pertinent question.

Thus, rather than there existing clearly erroneous findings as required under Rule 52(a) of the Federal Rules of Civil Procedure, the record affirmatively and substantially shows that Appellant did not prove his case: he and his father were through their actual demeanor and inconsistencies found not worthy of belief, and Appellant's one disinterested witness would not verify Appellant's claimed kinship.

POINT II. IT WAS NOT ERROR TO ADMIT EVIDENCE IMPEACHING THE TESTIMONY OF YOUNG YICK.

Appellant specifies as error the admission for impeachment of statements made during the adjudication of Young Yick's citizenship in 1950, and statements made prior thereto. Appellant argues that Young Yick's citizenship is *res judicata,* and that his testimony herein may not be impeached by his inconsistent statements heretofore. Appellant argues that because such impeaching evidence was allowed, "The Trial Court was allured [sic] into a prejudicial frame of mind against appellant's case. . . ."

Appellant's asserted legal position, and the effect upon the trial court, are both wrong.

The trial court did not readjudicate Young Yick's citizenship; indeed, the trial court specifically stated that it was bound by the prior adjudication (R-15), so found (R-21), and so concluded (R-22 and 23),

although it did express dissatisfaction with the prior adjudication (R-15).

The allowance of evidence was strictly for impeachment purposes only, was so stated by Appellee (R-71, R-77), and was allowed by the trial court on that basis (R-71, R-72, R-73 and 74, R-77 and 78).

The allowance by the trial court of such prior statements was correct. As this Court stated in *Wong Ken Foon v. Brownell,* 218 F.(2d) 444 (9th Cir. 1955), at page 446,

> "It is legitimate cross-examination to confront a witness with former statements and permit or request him to explain." *See Louie Hoy Gay v. Dulles,* 248 F.(2d) 421 (9th Cir. 1957).

As to the alleged "prejudicial frame of mind" of the trial judge because of the allowance of such impeaching evidence, it is difficult to believe that such could have occurred, since the trial judge held that Young Ah Kwai, Appellant's equal and co-plaintiff, had established by a preponderance, and was entitled to a declaration of United States nationality. Yet Young Yick, the impeachment of whom caused the alleged prejudicial frame of mind, had been a witness for both the successful claimant, Young Ah Kwai, and the unsuccessful claimant, the Appellant here.

POINT III. THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF YOUNG HON SUN.

Appellant urges that Young Hon Sun was not qualified to testify as to the family relationships in ques-

tion, since he was not a member of the family, and since his testimony was based upon community reputation.

Appellant fails to consider that a relationship to the family by the declarant, no matter how slight, is sufficient, *Fulkerson v. Holmes,* 117 U.S. 389 (1886), and that the witness testified that, according to Appellant's alleged brother, Young Ah Kwai, the witness is a cousin (R-258 to R-260). This relationship was not rebutted by Appellant, although both Young Yick and Young Ah Kwai were called in rebuttal (R-276, R-281). Accordingly, the witness' apparent relationship stands uncontroverted, and his statements therefore are the direct declarations of a member of the family, rather than of a stranger.

Such pedigree testimony is generally limited so as to provide a greater basis of credibility. But it should be remembered that that basis for the rule relates to credibility, and that, as in this case, the trier of fact should be allowed to hear such testimony, and make his own determination of the weight to be given it, particularly where the family relationship under question existed in a small, rural community, where general reputation of pedigree tends to be well-known and accurate. *See,* for a discussion thereof, *United States v. Mid-Continent Petroleum Corp.,* 67 F.(2d) 37, 45 (10th Cir. 1933). And, as established by the witness, matters of family relationships were of vital interest in the Chinese village, births being declared (R-251), and family records being maintained in the ancestral halls, as a common and public reference

(R-250). Indeed, the very presence and name of an "ancestral hall" indicates the great interest and emphasis, and hence, accuracy, upon matters of pedigree, within the entire community in that village.

Therefore, the trial court did not err in admitting such testimony by Young Hon Sun, for the reason that he was a relative testifying as to his own knowledge, and for the additional reason that the basis of his own knowledge was the strong interest and emphasis upon matters of pedigree in that Chinese village.

CONCLUSION.

The findings by the trial court were not clearly erroneous. Appellant failed to prove his case, because his witnesses both could not be believed and could not substantiate his claim. Therefore, the judgment of the lower court must be affirmed.

Dated, Honolulu, Hawaii,
February 9, 1959.

Respectfully submitted,

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No. 16266

United States

Court of Appeals

for the Ninth Circuit

NEFF INSTRUMENT CORPORATION, a Corporation, Appellant,

vs.

COHU ELECTRONICS, INC., and NEELY ENTERPRISES, Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—2-12-59

No. 16266

United States

Court of Appeals

for the Ninth Circuit

NEFF INSTRUMENT CORPORATION, a Corporation, Appellant,

vs.

COHU ELECTRONICS, INC., and NEELY ENTERPRISES, Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at bottom of page of Original Transcript of Record.

District Court of the United States, Southern District of California, Central Division

No. 438-58 Y

NEFF INSTRUMENT CORPORATION, a California corporation, Plaintiff,

vs.

COHU ELECTRONICS, INC., a Delaware corporation, and NEELY ENTERPRISES, a California corporation, Defendants.

COMPLAINT FOR INFRINGEMENT OF UNITED STATES LETTERS PATENT No. 2,832,848

Plaintiff complains of the Defendants and alleges:

I.

This cause of action arises under the patent laws of the United States and this court has jurisdiction pursuant to Title 28 of the United States Code, § 1338(a) and § 1400(b).

II.

The Plaintiff, Neff Instrument Corporation, is a corporation of the State of California and has its principal office at 2211 East Foothill Boulevard, Pasadena, California.

III.

Defendant, Cohu Electronics, Inc., is a corporation of the [2] State of Delaware and has its prin-

cipal place of business at 5725 Kearney Villa Road, San Diego, California, and a place of business at 14743 Lull Street, Van Nuys, California.

IV.

Defendant, Neely Enterprises, is a corporation of the State of California and has its principal place of business at 3939 Lankershim Boulevard, Los Angeles, California.

V.

Plaintiff, Neff Instrument Corporation, is the owner of all right, title and interest in and to United States Letters Patent Number 2,832,848, entitled "Electrical Signal Amplifiers", which was duly and regularly issued on April 29, 1958 on an application filed by Glen A. Neff. A copy of said Letters Patent is attached hereto as Exhibit "A". All right, title and interest in and to said patent was assigned to the Plaintiff, Neff Instrument Corporation on April 29, 1958, together with the right to recover for all past and future infringements.

VI.

Defendant, Cohu Electronics, Inc., has within the six (6) years last past wilfully and wantonly infringed and is now infringing said United States Letters Patent Number 2,832,848, by manufacturing, using and selling in the Southern District of California and elsewhere in the United States, electrical signal amplifiers embodying the inventions covered by said Letters Patent, and threatens and will continue to infringe said Letters Patent unless

enjoined therefrom by this court. The electrical signal amplifiers now known to infringe said Letters Patent are incorporated in the devices manufactured, used and sold by the Defendant, Cohu Electronics, Inc., under its Model No. 114-A.

VII.

Defendant, Neely Enterprises, has within the six (6) years last past wilfully and wantonly infringed and is now infringing [3] said United States Letters Patent Number 2,832,848, by using and selling in the Southern District of California and elsewhere in the United States, electrical signal amplifiers manufactured by the Defendant, Cohu Electronics, Inc., embodying the inventions covered by said Letters Patent, and threatens and will continue to infringe said Letters Patent unless enjoined therefrom by this court.

VIII.

Electrical signal amplifiers manufactured and sold by Plaintiff incorporating the inventions covered by said Letters Patent enjoy a wide acceptance in the trade and have become identified with Plaintiff. Soon after said electrical signal amplifiers manufactured by Plaintiff appeared on the market, Defendants, and each of them, became aware of the market and good will in the sale of such amplifiers established by Plaintiff and undertook the manufacture and sale of such amplifiers in the Southern District of California and elsewhere, thereby wrongfully appropriating such mar-

ket and good will to the detriment of Plaintiff. Plaintiff has been damaged by the Defendants, and each of them, by the acts herein complained of, and will suffer further damage and injury unless the said Defendants are enjoined from said acts of infringement and wrongful invasion of Plaintiff's rights.

IX.

Plaintiff has placed the required statutory notice pursuant to Title 35 United States Code § 287 on all electrical signal amplifiers which it has manufactured and sold under said Letters Patent since the issue date thereof.

Wherefore, Plaintiff prays that:

1. This court issue a preliminary and final judgment against further infringement of said Letters Patent by said Defendants, and each of them, their agents, servants, employees, officers and those persons in active concert or participation with the said [4] Defendants, and each of them;

2. This court order an accounting and judgment against Defendants of and for all damages suffered by Plaintiff by reason of Plaintiff's rights in said invention and by reason of said infringement of said Letters Patent, and that such accounting for damages shall be not less than a reasonable royalty based upon the aggregate sales price of devices sold by said Defendants embodying structures included within the terms of said Letters Patent;

3. Plaintiff be awarded its costs against Defend-

ants, and each of them, and reasonable attorney fees; and

4. Plaintiff be awarded such other and further relief as this court may deem just and proper.

Los Angeles, California, May 12, 1958.

ROBERT H. FRASER, and
RICHARD B. HOEGH,

/s/ By ROBERT H. FRASER,
Attorneys for Plaintiff. [5]

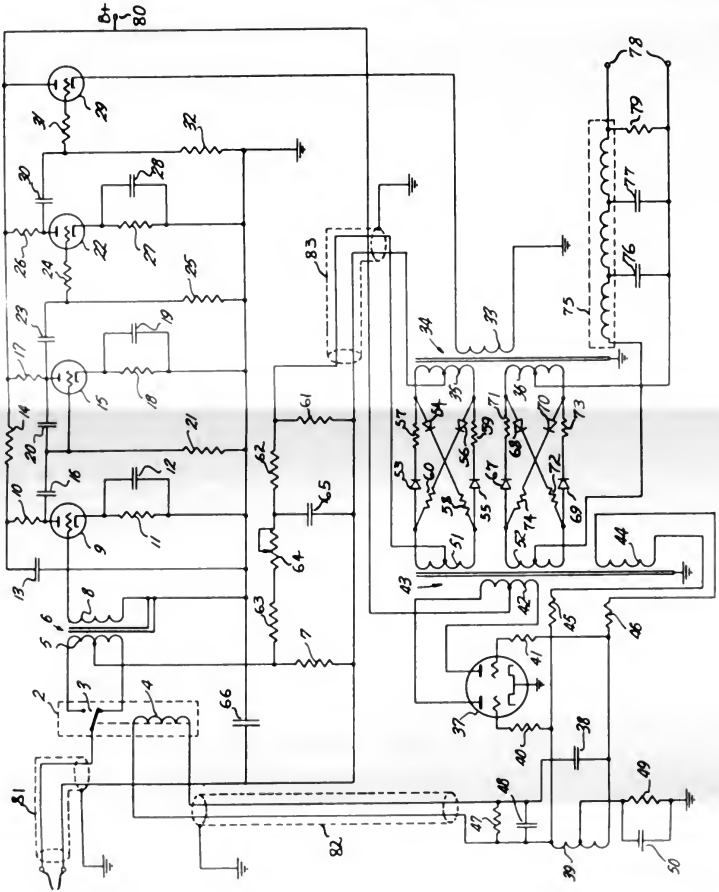
[Endorsed]: Filed May 12, 1958.

EXHIBIT "A"

April 29, 1958 G. A. NEFF 2,832,848

ELECTRICAL SIGNAL AMPLIFIERS

Filed Jan. 16, 1957



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2,832,848

ELECTRICAL SIGNAL AMPLIFIERS

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Application January 16, 1957, Serial No. 634,569

11 Claims. (Cl. 179—171)

This application relates to electrical signal amplifiers and more particularly to an electrical signal amplifier in which low frequency and unidirectional electrical signals are amplified by means of a modulated alternating current carrier wave.

Electrical signal amplifiers are frequently employed to generate relatively strong output signals corresponding to relatively weak input signals. Often an electrical signal comprising an input signal includes low frequency and unidirectional (D. C.) components, e. g. a direct current component which fluctuates in accordance with a variable. Conventional electrical signal amplifiers generally are unsuitable for use in amplifying signals including low frequency and unidirectional components since they include coupling devices between stages which block the passage of signals below a lower frequency limit so that low frequency and unidirectional components are lost in the amplification process. One way in which signals having low frequency and unidirectional components may be amplified is by means of an amplifier which is direct coupled between stages. However, it is well known that the overall gain of a direct coupled amplifier tends to be unstable since the aging of the electron tubes and components affects the overall gain of the amplifier. An additional disadvantage of a direct coupled amplifier is that each succeeding amplification stage generally must be elevated in electrical potential because the direct coupling between amplification stages applies the operating voltage from each stage to the next successive stage.

In order to avoid the aforementioned difficulties, unidirectional and low frequency signals to be amplified may be converted to a modulated alternating current carrier wave which is amplified by an alternating current amplifier which need not be direct coupled between amplification stages. If an output signal having unidirectional and low frequency components is desired, the amplified modulated alternating current carrier wave may be reconverted to a signal corresponding to the input signal having low frequency and unidirectional components.

It is well known that the stability of an amplifier in which a low frequency or unidirectional signal is converted to a modulated alternating current carrier wave for amplification may be increased by including a negative feedback circuit which applies a portion of an output signal to an input circuit in a direction which tends to reduce the input signal. However, where a feedback circuit is connected between an output circuit and an input circuit the result is that the input circuit is electrically connected to the output circuit. Where the input circuits and output circuits are to be maintained at different biasing potentials or where the input circuits of several amplifiers sharing a common output circuit must be electrically separate, it is essential that no electrical connection be made via a feedback circuit between input and output circuits. Heretofore, to provide isolated input circuits and output circuits where a feedback circuit is required, it has been necessary to include a mechanical

linkage. For example, a motor may be positioned in accordance with an output signal from an amplifier, and an electrical signal generating device, such as a potentiometer, may be linked to the motor and electrically connected in the feedback circuit. By means of the potentiometer, a feedback voltage is provided without electrically connecting the input circuit and the output circuit. Where the output circuit must be electrically separated from both the input circuit and the feedback circuit, it has been necessary to link an additional potentiometer to the motor which is positioned to generate an output signal.

In any system in which a mechanical linkage is included to isolate the input, output and feedback circuits, the elements of the mechanical linkage possess a certain amount of inertia which limits the capability of the system as a whole to respond to relatively fast variations in the input signal. Accordingly, an amplifier which includes a mechanical linkage is not suitable where rapidly varying signals must be amplified. Heretofore, there has been on satisfactory way to isolate the amplifier input circuits from the amplifier output circuits while at the same time preserving the amplifier's ability to amplify rapidly fluctuating input signals including low frequency and unidirectional components. Accordingly, it is one object of the invention to provide a new and improved amplifier in which the input circuit and output circuit are electrically isolated.

It is another object of the invention to provide an amplifier which is capable of responding to input signals which vary rapidly and in which the input circuit is electrically isolated from the output circuit.

It is an additional object of the invention to provide a new and improved amplifier having a feedback circuit.

It is still another object of the invention to provide a new and improved amplifier in which low frequency and unidirectional feedback signals are derived from an alternating current signal.

In accordance with the invention, an amplifier is provided having electrically separate input and output circuits in which an input signal is converted to a modulated alternating current carrier wave, the modulated alternating current carrier wave is amplified, a feedback signal including low frequency and unidirectional components is derived from the amplified modulated alternating current carrier wave, and an output signal is derived by a means separate from the means for deriving the feedback signal.

A better understanding of the invention may be had from the following detailed description taken in conjunction with the drawing, in which the single figure is a schematic circuit diagram of an amplifier including an illustrative embodiment of the invention.

In the amplifier of the drawing, an input signal including unidirectional (D. C.) components of either polarity may be applied to a pair of terminals 1. An input circuit to which the terminals 1 are connected includes a converter or modulator in the form of a vibrator-type circuit interrupter 2 which includes a set of single-pole double-throw switch contacts 3 and an actuating coil 4. When the actuating coil 4 is energized with alternating current, the switch contacts 3 open and close to connect one of the input terminals 1 alternately to opposite ends of a primary winding 5 of a transformer 6. A center tap on the primary winding 5 is returned to the other of the input terminals 1 via a resistor 7, across which appears a feedback signal which is described in detail below.

Due to the application of the input signal alternately to opposite ends of the primary winding 5, an alternating current signal appears across the primary winding 5 which is coupled to a secondary winding 8 of the transformer 6 in the form of a carrier wave which is amplitude modu-

lated in accordance with the signal applied to the terminals 1. In addition, the alternating current signal appearing across the secondary winding 8 bears a phase relationship to the alternating current wave applied to the actuating coil 4 which corresponds to the polarity of the input signal. That is, for a positive input signal the alternating current signal is of one phase, and for a negative input signal the alternating current signal is of opposite phase.

The alternating current signal from the secondary winding 8 is applied to the control electrode of an amplifier electron tube 9. Operating voltage is applied to the anode of the electron tube 9 via a load resistor 10. A conventional cathode resistor 11 and a by-pass capacitor 12 are connected in parallel to the cathode of the electron tube 9. A decoupling capacitor 13 maintains the end of the load resistor 10 away from the electron tube 9 at substantially ground potential for alternating currents and a resistor 14 is connected serially with the load resistor 10 to isolate the amplifier tube 9 from the remainder of the circuit.

At the anode of the electron tube 9 an alternating current signal appears which is passed to the control electrode of a second amplifier electron tube 15 via a coupling capacitor 16. A conventional load resistor 17 is connected to the anode of the electron tube 15 and a cathode resistor 18 and by-pass capacitor 19 are connected to the cathode of the electron tube 15. In addition, a capacitor 20 is connected between the anode and control electrode of the electron tube 15 to stabilize the amplifier circuit and eliminate oscillations. A conventional grid leak resistor 21 is connected between the control electrode of the electron tube 15 and ground reference potential.

The alternating current signal appearing at the anode of the electron tube 15 is applied to the control electrode of a third amplifier electron tube 22 via a coupling capacitor 23 and a grid current limiting resistor 24. A conventional grid leak resistor 25 returns the control electrode to ground reference potential, a load resistor 26 is connected to the anode, and a cathode resistor 27 and by-pass capacitor 28 are connected in parallel to the cathode of the electron tube 22.

The alternating current signal appearing at the anode of the electron tube 22 is passed to the control electrode of a cathode follower electron tube 29 via a coupling capacitor 30 and a grid current limiting resistor 31. The control electrode of the cathode follower electron tube 29 is returned to ground reference potential via the resistor 31 and a grid leak resistor 32.

In a conventional manner, operating voltage is applied directly to the anode of the cathode follower electron tube 29, and a primary winding 33 of an output transformer 34 is connected serially with the cathode of the electron tube 29. The circuit of the cathode follower electron tube 29 functions as an impedance changing device to couple the amplifier of the electron tubes 9, 15, and 22 to the load presented by the transformer 34.

The output transformer 34 includes two separate secondary windings 35 and 36, across each of which appears an alternating current signal. Connected to each of the secondary windings 35 and 36 is a separate synchronous demodulator which is adapted to compare alternating currents of the same frequency and provide an output signal as a result of the comparison. The synchronous demodulators are described in detail below.

An alternating current wave which is employed as a reference wave may be generated by means of an oscillator which includes a double-triode electron tube 37. A frequency determining tank circuit is included in the oscillator comprising a capacitor 38 and an inductance which is provided in part by a coil 39 and in part by the inductance of the coil 4 of the converter 2. In operation, the capacitor 38 and the coils 4 and 39 have a predetermined resonant frequency which may be for example, 400 cycles per second.

Each end of the coil 39 is connected to a control electrode of the double-triode electron tube 37 via the resistors 40 and 41. In operation, the sections of the electron tube 37 are alternately rendered conducting and the resistors 40 and 41 limit the grid current flow in such a way as to generate a substantially square switching wave between the anodes of the electron tube 37. The square switching wave is applied across a center tapped primary winding 42 of a transformer 43. A feedback circuit for the oscillatoor is provided by means of a secondary winding 44 of the transformer 43 which is connected to the tank circuit coil 39 via a pair of isolation resistors 45 and 46. In practice it has been found that there is a tendency for parasitic oscillation to occur in the converter coil 4. For this reason a damping resistor 47 and capacitor 48 are connected across the coil 4. In order to provide biasing for the electron tube 37 and a return circuit from the cathode of the electron tube 37 to the tank circuit, a resistor 49 and a by-pass capacitor 50 are connected in parallel between a center tap on the coil 39 and ground reference potential.

The alternating current switching wave appearing across the primary winding 42 is induced in a pair of secondary windings 51 and 52 of the transformer 43.

The reference wave generated by the oscillator is used for the purpose of driving the actuating coil 4 of the converter 2. In addition, an alternating current wave from the oscillator is applied to the synchronous demodulators in which the amplified alternating current signal is compared with the reference wave. Thus, by means of the oscillator the reference wave applied to the synchronous demodulators bears a fixed phase relationship to the opening and closing of the contacts 3 and also bears a fixed phase relationship to the alternating current signal.

A feedback circuit synchronous demodulator includes a secondary winding 51 of the transformer 43 and a secondary winding 35 of the transformer 34. Connected between the secondary windings 35 and 51 is a ring-type demodulator which includes four diodes 53, 54, 55, and 56. Each of the diodes 53–56 has a resistor 57, 58, 59, 60 connected serially therewith for the purpose of minimizing the effect of any dissimilarities in the characteristics of the diodes 53–56 and to limit the maximum current flow therethrough. In operation, when the reference wave introduced across the secondary winding 51 is of the same phase as the alternating current signal appearing across the winding 35, a signal corresponding to the input signal including low frequency components and a unidirectional component of a given polarity appears between the center tap connections on the secondary windings 35 and 51. In contrast, when the reference wave appearing across the winding 51 is of opposite phase to the alternating current signal appearing across the winding 35, a signal corresponding to the input signal appears between the center tap connections to the secondary windings 35 and 51 having a unidirectional component which is of opposite polarity to the aforementioned given polarity. The magnitude of the unidirectional component is a function of the relative amplitudes of the reference wave and the alternating current signal. Since the reference wave is of a much larger amplitude than the alternating current signal, the unidirectional component has a magnitude which varies in accordance with the amplitude of the alternating current signal. Thus, a signal is generated by the feedback circuit synchronous demodulator which has a polarity corresponding to the phase of the alternating current signal and a magnitude corresponding to the amplitude of the alternating current signal. Since the phase and amplitude of the alternating current signal correspond to the input signal as described above, the signal provided by the feedback circuit synchronous demodulator represents an amplified version of the input signal including both low frequency and unidirectional components as well as any upper frequency components appearing therein.

The signal derived from the center tap connections on

the secondary windings 35 and 51 appears across a resistor 61. The signal appearing across the resistor 61 is applied to a voltage divider comprising the fixed resistors 62, 63, and 7 and an adjustable resistor 64. A by-pass capacitor 65 functions to filter the unwanted alternating current demodulation products from the feedback signal so that a low frequency and unidirectional feedback signal appears across the resistor 7. By varying the adjustable resistor 64 the amount of feedback can be controlled which functions to vary the overall gain of the amplifier.

The feedback circuit is a negative or inverse feedback arrangement in which the signal appearing across the resistor 7 opposes the input signal applied to the terminals 1. A capacitor 66 returns one side of the input circuit to ground reference potential for alternating current. Where the input transformer 6 includes appropriate shielding between the primary winding 5 and the secondary winding 8, the capacitor 6 may be omitted so that the input circuit it truly floating for all frequencies of input signals applied thereto. Since the transformers 34 and 43 are adapted to pass only alternating current the feedback circuit synchronous demodulator floats with the input circuit and is conductively isolated from the remainder of the circuit and from ground reference potential.

In a similar fashion, an output signal including unidirectional and low frequency components may be derived from an output circuit synchronous demodulator which includes the secondary winding 52 of the transformer 43 and the secondary winding 36 of the transformer 34. The output circuit synchronous demodulator includes four diodes 67, 68, 69, and 70 which are each connected serially with a resistor 71, 72, 73, 74 for the purpose of minimizing the effect of any dissimilarities in the diodes 67–70 and limiting the current flow therethrough.

Across the center tap connections to the secondary windings 36 and 52 appears a signal corresponding to the relative phases and amplitudes of the reference wave appearing across the winding 52 and the alternating current signal appearing across the winding 36. The signal appearing between the center tap connections to the windings 36 and 52 is applied to a filter circuit which includes an inductance 75 having three separate sections and the filter capacitors 76 and 77. The inductance 75 and filter capacitors 76 and 77 effectively remove substantially all alternating current signal components of the frequency of the reference wave and higher from the signal so that a signal appears at the output terminals 78 corresponding to an amplified version of the input signal. A resistor 79 is connected across the terminals 78 to terminate the filter in a proper impedance.

The following list of electron tube types and component values is given by way of example, being indicative only of one workable embodiment:

Electron tubes 9, 15, 22, 29	Triode section of tube type 12AY7.
Electron tube 37	Tube type 5687.
Resistor 7	310 ohms.
Resistors 10, 17, 26	100,000 ohms.
Resistors 11,18, 27, 45, 46	1,000 ohms.
Resistors 14, 24, 31	47,000 ohms.
Resistors 21, 25, 32	470,000 ohms.
Resistors 40, 41	6,800 ohms.
Resistor 47	22 ohms.
Resistor 49	22,000 ohms.
Resistors 57, 58, 59, 60, 71, 72, 73, 74	300 ohms.
Resistors 61, 79	100 ohms.
Resistors 62, 63	15,000 ohms.
Resistor 64	10,000 ohms.
Capacitors 12, 19, 28	100 microfarads.
Capacitor 20	100 micromicrofarads.
Capacitor 13	10 microfarads.
Capacitors 16, 23, 30	.1 microfarad.

Capacitors 38, 65, 66	1 microfarad.
Capacitor 48	.022 microfarad.
Capacitor 50	25 microfarads.
Capacitors 76, 77	18 microfarads.
Coil 39	150 millihenries.
Inductance 75	3 sections; 90 millihenries, 180 millihenries and 90 millihenries.

The connections made to the core symbols in the drawing for each of the transformers 6, 34 and 43 indicate that the transformers are of the type which include an electrostatic shield for reducing capacitive coupling between the windings whereby energy is transferred by the inductive action of the transformers only.

The dashed enclosures 81, 82, and 83 surrounding the connections to the input terminals 1, the connections to the converter coil 4 and the connections between the feedback circuit synchronous demodulator and the resistor 61 indicate that in a preferred embodiment, shielded cables should be used with the shields being connected to ground reference potential.

It will be appreciated that a conventional heater winding is included in each of the several electron tubes 9, 15, 22, 29 and 37 for elevating the cathodes to electron emissive temperature although the actual heater symbols and connections have been omitted to simplify the drawing. Suitable voltages for energizing the heaters along with a positive operating potential may be derived from any conventional power supply (not shown). The positive operating potential may be applied to the anodes of all the electron tubes between a terminal 80 and ground reference potential.

In accordance with the invention, the exemplary embodiment includes an amplifier in which a unidirectional input signal is converted to an alternating current signal for amplification, the feedback circuit supplies a feedback signal corresponding to the input signal to the input circuit without affecting the electrical isolation of the input circuit from the remainder of the amplifier, and the output circuit is conductively isolated from the input circuit and the remainder of the amplifier. The output circuit may be arranged by means of a synchronous demodulator to provide an output signal having unidirectional and low frequency components as well as upper frequency components appearing in the input signal.

Although a specific demodulator circuit has been shown, it will be appreciated that other types of comparison circuits may be employed. Accordingly, the words "synchronous demodulator" as used herein, are intended to have general meaning and to cover any form of comparison circuit which is adapted to provide a signal or voltage representing a comparison between an alternating current signal and a reference wave.

Although an exemplary embodiment of the invention has been illustrated and specific circuit component values have been given, the invention is not limited thereto. Accordingly, the accompanying claims are intended to include all equivalent arrangements falling within the scope of the invention.

What is claimed is:

1. Apparatus including the combination of an input circuit for receiving an input signal, means connected to the input circuit for generating an alternating current wave modulated in accordance with the input signal, an amplifier coupled to the generating means to receive said alternating current wave, a negative feedback circuit connected to the input circuit, said feedback circuit including a demodulator coupled to the amplifier to derive a negative feedback voltage from an amplified alternating current wave from the amplifier, an output circuit coupled to the amplifier, and means for conductively isolating the output circuit from the input and feedback circuits.

2. Apparatus for amplifying an input signal having a unidirectional component including in combination a con-

verter for generating an alternating current signal representing the input signal, an alternating current signal amplifier coupled to the converter, a pair of synchronous demodulators each of which is adpated to generate a voltage representing a comparison between an alternating current signal and an alternating current reference wave, each of said synchronous demodulators being conductively isolated from the other, means applying an alternating current reference wave to both of said synchronous demodulators, means coupling the alternating current signal amplifier to both of the synchronous demodulators, means deriving a negative feedback voltage from one of the synchronous demodulators, and means deriving an output voltage from the other of the synchronous demodulators.

3. In an amplifier in which an input circuit is electrically separated from an output circuit, the combination of an input circuit for receiving an input signal, said input circuit including a converter for generating an alternating current signal modulated in accordance with the input signal, an alternating current signal amplifier, means coupling the converter to the alternating current signal amplifier for the passage of alternating current signals only, a feedback circuit demodulator, means coupling the alternating current signal amplifier to the feedback circuit demodulator for the passage of alternating current signals only, means connected between the feedback circuit demodulator and input circuit for opposing a feedback voltage derived from the feedback circuit demodulator to the input signal in the input circuit, an output circuit demodulator conductively isolated from the feedback circuit demodulator and the input circuit, means coupling the alternating current signal amplifier to the output circuit demodulator for the passage of alternating current signals only, and means driving the feedback and output circuit demodulators and the converter synchronously whereby both the feedback voltage and the output voltage include any low frequency or unidirectional components appearing in the input signal.

4. In an amplifier of the type in which input signals are converted to alternating current signals of predetermined frequency for amplification, the combination of an input circuit, a converter coupled to the input circuit for generating alternating current signals having a predetermined frequency of reversible phase and variable amplitude corresponding to the polarity and magnitude of signals applied to the input circuit, an alternating current signal amplifier coupled to the converter to receive alternating current signals only, a negative feedback circuit coupled between the alternating current signal amplifier and the input circuit, said feedback circuit including a synchronous demodulator which is coupled to the alternating current signal amplifier to receive alternating current signals only, an output circuit coupled to the alternating current signal amplifier, means for conductively isolating the output circuit from the input and feedback circuits, said output circuit including a synchronous demodulator which is coupled to the alternating current signal amplifier to receive alternating current signals only, and a source of alternating current waves of said predetermined frequency coupled to the feedback and output circuit synchronous demodulators.

5. In an amplifier of the type in which an input signal is converted to an alternating current signal for amplification, the combination of an input circuit for receiving input signals, a converter connected to the input circuit for generating alternating current signals of predetermined frequency having a reversible phase and variable amplitude corresponding to the polarity and magnitude of the input signal, an alternating current signal amplifier coupled to the converter to receive alternating current signals only, a negative feedback circuit coupled between the alternating current signal amplifier and the input circuit, said feedback circuit including a synchronous demodulator which is coupled to the alternating current signal amplifier to receive alternating current signals only, an output circuit conductively separate from the feedback circuit demodulator and the input circuit, said output circuit including a synchronous demodulator which is coupled to the alternating current signal amplifier to receive alternating current signals only, and a source of alternating current waves of said predetermined frequency coupled to said converter, said feedback circuit synchronous demodulator, and said output circuit synchronous demodulator.

6. An amplifier including the combination of an input circuit for receiving a signal having unidirectional and low frequency components, a converter coupled to the input circuit for providing an alternating current signal modulated in accordance with a signal applied to the input circuit, an amplifier coupled to the converter to receive alternating current signals, a feedback circuit demodulator coupled between the amplifier and the input circuit for deriving a negative feedback voltage from an amplified alternating current signal from the amplifier, an output circuit coupled to the amplifier, means for conductively isolating the output circuit from the input circuit and the feedback circuit demodulator and means driving the feedback circuit demodulator and the converter synchronously whereby the feedback voltage includes unidirectional and low frequency components corresponding to an input signal applied to the input circuit.

7. Apparatus in accordance with claim 6 in which the output circuit includes means for deriving an output signal including unidirectional and low frequency components corresponding to an input signal applied to the input circuit.

8. Apparatus for amplifying an input signal, including the combination of an input transformer having at least one primary winding and at least one secondary winding, an input circuit including a converter coupled to the primary winding for generating an alternating current signal modulated in accordance with an input signal applied to the input circuit, an amplifier coupled to the secondary winding, an output transformer having at least one primary winding and at least one secondary winding, said output transformer primary winding being connected to said amplifier, a feedback circuit demodulator connected between the output transformer secondary winding and the input circuit, an output circuit coupled to the amplifier, and means for conductively isolating the output circuit from the input circuit and the feedback circuit demodulator.

9. Apparatus in accordance with claim 8 including means for driving the converter and the feedback circuit demodulator synchronously.

10. Apparatus in accordance with claim 8 including an output circuit demodulator coupled to a secondary winding of the output transformer conductively isolated from the secondary winding of the output transformer to which the feedback circuit demodulator is connected.

11. Apparatus in accordance with claim 10 including means for driving the converter, the feedback circuit demodulator and the output circuit demodulator synchronously.

References Cited in the file of this patent

UNITED STATES PATENTS

2,297,543	Eberhardt et al.	Sept. 29, 1942
2,719,191	Hermes	Sept. 27, 1955
2,773,137	Hollmann	Dec. 4, 1956
2,795,648	Mason	June 11, 1957

FOREIGN PATENTS

115,412	Australia	July 9, 1942
857,402	Germany	Nov. 27, 1952

[Title of District Court and Cause.]

ANSWER

Come Now the defendants and in answer to the complaint herein allege, aver and deny as follows:

I.

Answering Paragraph I of the complaint, defendants admit that the causes of action attempted to be stated herein are laid under the patent laws of the United States, but defendants deny that this court has jurisdiction under Title 28 of the United States Code, § 1338(a) and § 1400(b).

II.

Answering Paragraph II of the complaint, defendants admit the allegations contained therein.

III.

Answering Paragraph III of the complaint, defendants admit the allegations contained therein.

IV.

Answering Paragraph IV of the complaint, defendants admit the allegations contained therein.

V.

Answering Paragraph V of the complaint, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny said allegations for want of such knowledge or information.

VI.

Answering Paragraph VI of the complaint, defendants deny each and every allegation contained therein.

VII.

Answering Paragraph VII of the complaint, defendants deny each and every allegation contained therein.

VIII.

Answering Paragraph VIII of the complaint, defendants deny each and every allegation contained therein.

IX.

Answering Paragraph IX of the complaint, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny said allegations for want of such knowledge or information.

X.

Further answering said complaint and for a separate and complete defense thereto, defendants allege that this court lacks jurisdiction of this case in that all of the Cohu Electronics, Inc. model No. 114A amplifiers manufactured and/or sold by defendants have been manufactured and/or sold for the United States Government within the meaning of Title 28 U.S.C. Section 1498 and that plaintiff's sole remedy in the premises is an action [21] against the United States in the Court of Claims.

XI.

Further answering said complaint and for a sepa-

rate and complete defense thereto, defendants allege that pretended United States Letters Patent No. 2,832,848 are invalid and void because the original inventor named therein was not the original and first inventor of the alleged improvement described and claimed therein, but the same in all its material and substantial parts was invented, known and used by others in this country before his alleged invention or discovery thereof, was patented and described in printed publications in this and foreign countries before his alleged invention or discovery thereof or more than one year prior to his application for patent and was in public use and on sale in this country more than one year prior to his application for patent.

(a) The patents and publications above referred to insofar as they have at present been ascertained are as follows:

Inventor—Patent No.—Date:

Milnor—1,378,712—May 17, 1921.

Espenschied—1,428,156—September 5, 1922.

Whitelock—1,925,160—September 5, 1953.

Black—2,102,671—December 21, 1937.

Gunn—2,114,298—April 19, 1938.

Vance—2,190,743—February 20, 1940.

Perkins—2,210,001—August 6, 1940.

Skillman—2,210,956—August 13, 1940.

Six—2,221,116—November 12, 1940.

Pieplow—2,226,288—December 24, 1940.

Bruck—2,269,249—January 6, 1942.

Haantjes—2,290,553—July 21, 1942.

Eberhardt et al.—2,297,543—September 29, 1942.

Seargent—2,413,788—January 7, 1947. [22]
Mosely et al.—2,459,177—January 18, 1949.
Williams, Jr.—2,459,730—January 18, 1949.
Liston—2,497,129—February 14, 1950.
Tarpley—2,622,192—December 16, 1952.
Goldberg et al.—2,684,999—July 27, 1954.
Hermes—2,719,191—September 27, 1955.
Gilbert—2,744,168—May 1, 1956.
Hollomann—2,773,137—December 4, 1956.
Mason—2,795,648—June 11, 1957.

Foreign

Australia—115,412—July 9, 1942.
Germany—857,402—November 27, 1952.

Magazine Articles

"Feedback Improves Response of D-C Amplifier", by Joseph F. Lash; Electronics, pub. by McGraw-Hill Book Co., Inc., for February 1949, pp. 109-111.

"D-C Amplifier Stabilized for Zero and Gain", by A. J. Williams, Jr., R. E. Tarpley, W. R. Clark, of Leeds & Northrup Co. Presentation before A.I.E.E. at Pittsburgh, Pa., Jan. 26-30, 1948. A.I.E.E. Tech. Paper 48-9 made available for printing Nov. 26, 1947. Printed in Transactions of American Institute of Electrical Engineers, 1948, pp. 47-57.

Books

"Radio Engineers Handbook", Terman, McGraw-Hill Book Co., Inc., pub. 1943, pp. 654, 655, 656.

"Radio Engineering", Terman, 3rd Edition, McGraw-Hill Book Co., Inc., pub. 1947, pp. 733-738.

"Waveforms", Chance, Hughes, McNichol, Sayre & Williams, pub. 1949, McGraw-Hill Book Co., Inc., Chapter 11, pp. 389-426. [23]

(b) The instances of prior invention, knowledge, use and sale above referred to insofar as they have at present been ascertained are as follows: By the patentees of the patents cited in Paragraph (a) above at the addresses given in said patents.

(c) Defendants beg leave to add hereto by amendment to this answer additional patents and publications and instances of prior invention, knowledge, use and sale above referred to when ascertained.

XII.

For a further, separate and complete defense to the complaint herein, defendants allege that by reason of the proceedings in the United States Patent Office during prosecution of the application which resulted in said pretended United States Letters Patent No. 2,832,848, and the admissions and representations therein made by or in behalf of the alleged inventor in order to induce the grant of said pretended Letters Patent, the plaintiff is estopped to claim for said pretended Letters Patent a construction, were the same otherwise possible, as would cause said pretended Letters Patent to cover or include any device or apparatus manufactured, used or sold by the defendants.

XIII.

Defendants allege that said pretended Letters Patent of the United States No. 2,832,848 are in-

valid and void because the alleged improvements described and claimed therein do not constitute patentable subject matter within the meaning of the Patent Laws, in view of the prior state of the art and what was common knowledge on the part of those skilled in the art, all prior to the dates of the alleged inventions thereof by the patentees named therein.

XIV.

Further answering said complaint and as a further, separate and complete defense thereto, defendants allege that [24] pretended Letters Patent No. 2,832,848 are invalid and void as each of the claims thereof fails to particularly point out and distinctly claim the subject matter thereof as required by Title 35 U.S.C. Section 1112.

XV.

Further answering said complaint, and as a further, separate and complete defense thereto, defendants allege that plaintiff comes into this court with unclean hands and cannot prevail against the defendants in that, on information and belief, plaintiff's predecessor, inventor, president and sole stockholder, G. A. Neff, conceived the subject matter of his pretended Letters Patent while he was employed by another under terms and conditions which required him to disclose such invention to his employer and if necessary to assign any invention to such employer, and that for the purpose of defrauding said employer, said G. A. Neff concealed the fact that he had made the invention purported to

be patented in pretended Letters Patent No. 2,832,-848 and neglected to file an application for Letters Patent of the United States thereon until after he had severed relations with his previous employer, and that plaintiff is chargeable with full knowledge of the acts of said G. A. Neff aforesaid to the extent that to permit the plaintiff to prevail herein would require this court to assist the plaintiff in perpetrating a fraud upon said Neff's former employer.

Wherefore, defendants pray that the complaint herein be dismissed and that defendants recover their costs and disbursements incurred herein, including reasonable attorneys' fees.

LYON & LYON,

By s/ CHARLES G. LYON,
Attorneys for Defendants. [25]

Acknowledgment of Service Attached. [26]

[Endorsed]: Filed July 18, 1958.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Come now the defendants, Cohu Electronics, Inc., and Neely Enterprises, through their attorneys, and move this Honorable Court to enter the enclosed

Findings of Fact, Conclusions of Law and Summary Judgment.

Upon the hearing of this motion, defendants will rely upon the affidavits of Richard Silberman and Thomas Hamilton and the annexed Memorandum of Points and Authorities.

Dated this 21st day of July, 1958.

LYON & LYON

By /s/ CHARLES G. LYON,
Attorneys for Defendants.

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD T. SILBERMAN AND THOMAS M. HAMILTON

State of California,
County of San Diego—ss.

Richard T. Silberman and Thomas M. Hamilton, each being first duly sworn, each for himself deposes and says: that each is a Vice President of the defendant, Cohu Electronics, Inc., and each has direct knowledge of the sales and deliveries of all 114A amplifiers manufactured and sold by defendant. That such amplifiers have been sold and delivered to date to the following purchasers in con-

nection with Government prime contracts and under purchase orders as follows:

Customer	Customer Purchase Order No.	Government Contract No.	Quantity	Rating
General Electric	022-8757	AFW33-038-AC-22193	1	
Edgerton Germeshausen and Grier	J-35108	AT(29-1)1183	6	DO-E2
Columbia Research	P13,918	BXM28163 Subcontract 76	1	DO-A2
Lockheed Aircraft	52-144	NORD(f)1772	18	Polaris program
Sandia Corp.	51-4583	Prime contractor to AEC AT(29-1)789	2	DO-E2
U. S. Naval Ordnance	60530/4051 Y 5561-58		1	DO-A6
Westinghouse	73-A-138174	AT-11-1-GEN-14	1	DO-E1
North American Aviation	R853X-727100	AFO4(647)171	1	DX-A2
Sandia Corp.	15-1232	Prime contractor to AEC AT(29-1)789	1	

That no 114A amplifiers have been sold to civilians for civilian use and that all 114A amplifiers sold and delivered have been in connection with use on a specific United States Government prime contract.

/s/ RICHARD T. SILBERMAN,

/s/ THOMAS M. HAMILTON.

Subscribed and sworn to before me this 18th day of July, 1958.

[Seal] /s/GERALDINE F. DICKIE,
Notary Public in and for Said County and State.

My commission expires November 25, 1961.

[Endorsed]: Filed July 21, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES TO DEFENDANT COHU ELECTRONICS, INC.

The plaintiff requests that the defendant, Cohu Electronics, Inc. (hereinafter referred to as "Cohu"), by an authorized officer thereof, answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure the following interrogatories:

1. State the serial numbers of all Kintel Model 114A amplifiers sold by Cohu.

2. State the serial numbers of all model 114A amplifiers manufactured by Cohu.

3. State the names and addresses of all persons or companies to whom Kintel 114A amplifiers had been sold or delivered by Cohu [43] prior to August 31, 1958.

4. State the quantity and the serial numbers of all Kintel 114A amplifiers delivered or sold to each of the persons or companies named in your answer to the foregoing interrogatory.

5. State to the best of your knowledge the manner in which the Kintel 114A amplifiers sold to each person or company named in the answer to Interrogatory No. 3 are used by such person or company.

6. State whether or not any amplifiers having similar characteristics to Kintel Model 114A amplifiers have been manufactured or sold by Cohu which have not been designated as Model 114A amplifiers.

7. If the answer to Interrogatory No. 6 is in the affirmative, state the model number or other designation of each such amplifier, the present location of each such amplifier, and if sold, to whom sold.

8. State whether or not any Kintel Model 114A amplifiers have been manufactured or sold which do not bear serial numbers.

9. If the answer to Interrogatory No. 8 is in the affirmative, state the manner in which each such amplifier is designated, the present location of each such amplifier, and if sold, to whom sold.

10. State to the best of your knowledge whether

any Kintel 114A amplifier has been sold or delivered to the United States Government.

11. If the answer to Interrogatory No. 10 is in the affirmative, state the name and address of each company or person who sold or delivered such an amplifier to the government, and the quantity and serial numbers of the amplifiers sold or delivered to the government by each such company.

12. State the present location and the quantity and serial numbers of all Kintel 114A amplifiers, if any, which had not been delivered to purchasers thereof prior to August 31, 1958. [44]

13. State the names and addresses of all persons or companies from whom Cohu has received orders for Kintel 114A amplifiers prior to August 31, 1958, and state the quantity of such amplifiers each such person or company ordered, and the date of each such order.

14. State the date upon which Cohu acknowledged or accepted each order set forth in the answer to Interrogatory No. 13.

15. If any orders set forth in the answer to Interrogatory No. 13 had not been filled on August 31, 1958, state as to each unfilled order the name and address of the person or company who placed the order, to whom the amplifiers are to be delivered, and, to the best of your knowledge, by whom the amplifiers are to be used.

16. State the name and address of each person or company who ordered one or more Kintel 114A amplifiers pursuant to a government contract and state the identifying number of each such contract.

17. (a) As to each contract listed in the answer to Interrogatory No. 16, state the applications in which Kintel 114A amplifiers were to be used by the person or company who placed the order.

(b) As to each contract listed in the answer to Interrogatory No. 16, state whether Kintel 114A amplifiers are to be or have been incorporated as components of devices which are to be delivered or have been delivered to the government.

(c) As to each contract listed in the answer to Interrogatory No. 16, state whether Kintel 114A amplifiers are to be or have been incorporated in devices which are to be retained by the contractor named in each such contract.

18. As to each contract listed in the answer to Interrogatory No. 16, state whether each such contract contained an "authorization and consent" clause which you contend authorizes patent infringement by Cohu in the manufacture and sale of Kintel 114A amplifiers.

19. As to each contract listed in the answer to Interrogatory No. 16, set forth a copy of each such "authorization and consent" clause. [45]

20. As to each contract listed in the answer to Interrogatory No. 16, state whether or not the contract or any other document contains a patent indemnity clause under which you agree to indemnify either the purchaser or the government for patent infringement.

21. As to each contract listed in the answer to

Interrogatory No. 16, set forth a copy of each such patent indemnity clause.

Dated: August 27, 1958.

ROBERT H. FRASER,
RICHARD B. HOEGH,
/s/ By ROBERT H. FRASER. [46]

Acknowledgment of Service Attached. [47]

[Endorsed]: Filed August 28, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES TO DEFENDANT NEELY ENTERPRISES

The plaintiff requests that the defendant, Neely Enterprises, (hereinafter referred to as "Neely") by an authorized officer thereof, answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure the following interrogatories:

1. State the serial number of all Kintel 114A amplifiers sold by Neely.

2. State the names and addresses of all persons or companies to whom Kintel 114A amplifiers had been sold or delivered by Neely prior to August 31, 1958.

3. State the quantity and the serial numbers of all Kintel [48] 114A amplifiers delivered or sold to each of the persons or companies named in the answer to the foregoing interrogatory.

4. State to the best of your knowledge the man-

ner in which the Kintel 114A amplifiers sold to each person or company named in the answer to Interrogatory No. 2 are used by such person or company.

5. State whether or not any amplifiers having similar characteristics to Kintel Model 114A amplifiers have been manufactured by Cohu Electronics, Inc. and sold by Neely which have not been designated as Model 114A amplifiers.

6. If the answer to Interrogatory No. 5 is in the affirmative, state the model number or other designation of each such amplifier, the present location of each such amplifier, and if sold, to whom sold.

7. State whether or not Neely has sold any Kintel Model 114A amplifiers which do not bear serial numbers.

8. If the answer to Interrogatory No. 7 is in the affirmative, state the manner in which each such amplifier is designated, the present location of each such amplifier, and if sold, to whom sold.

9. State to the best of your knowledge whether any Kintel 114A amplifier purchased through Neely has been sold or delivered to the United States Government.

10. If the answer to Interrogatory No. 9 is in the affirmative, state the name and address of each company or person who sold or delivered such an amplifier to the government, and the quantity and serial numbers of the amplifiers sold or delivered to the government by each such company.

11. State the present location and the quantity and serial numbers of all Kintel 114A amplifiers, if any, which had been ordered through Neely but had not

been delivered to the purchasers thereof prior to August 31, 1958.

12. State the names and addresses of all persons or companies [49] from whom Neely has received orders for Kintel 114A amplifiers prior to August 31, 1958, and state the quantity of such amplifiers each such person or company ordered and the date of each such order.

13. State the date upon which Neely acknowledged or accepted each order set forth in the answer to Interrogatory No. 12.

14. If any orders set forth in the answer to Interrogatory No. 12 had not been filled on August 31, 1958, state as to each unfilled order the name and address of the person or company who placed the order, to whom the amplifiers are to be delivered, and, to the best of your knowledge, by whom the amplifiers are to be used.

15. State the name and address of each person or company who ordered one or more Kintel 114A amplifiers through Neely pursuant to a government contract and state the identifying number of each such contract.

16. (a) As to each contract listed in the answer to Interrogatory No. 15, state the applications in which Kintel 114A amplifiers were to be used by the person or company who placed the order.

(b) As to each contract listed in the answer to Interrogatory No. 15, state whether Kintel 114A amplifiers are to be or have been incorporated as components of devices which are to be delivered or have been delivered to the government.

(c) As to each contract listed in the answer to Interrogatory No. 15, state whether Kintel 114A amplifiers are to be or have been incorporated in devices which are to be retained by the contractor named in each such contract.

17. As to each contract listed in the answer to Interrogatory No. 15, state whether each such contract contained an "authorization and consent" clause which you contend authorizes patent infringement in the sale of Kintel 114A amplifiers.

18. As to each contract listed in the answer to Interrogatory No. 15, set forth a copy of each such "authorization and consent" clause. [50]

19. As to each contract listed in the answer to Interrogatory No. 15, state whether or not the contract or any other document contains a patent indemnity clause under which Neely or Cohu Electronics, Inc. agrees to indemnify either the purchaser or the government for patent infringement.

20. As to each contract listed in the answer to Interrogatory No. 15, set forth a copy of each such patent indemnity clause.

Dated: August 27, 1958.

ROBERT H. FRASER,
RICHARD B. HOEGH,
/s/ By ROBERT H. FRASER. [51]

Acknowledgment of Service Attached. [52]

[Endorsed]: Filed August 28, 1958.

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF OBJECTIONS TO PLAINTIFF'S INTERROGATORIES BY DEFENDANT, COHU ELECTRONICS, INC.

Plaintiff, on or about August 27, 1958, served on Defendant, Cohu Electronics, Inc., interrogatories numbered 1 through 21. Defendant, Cohu Electronics, Inc., objects to each and every interrogatory as premature, improper, and beyond the scope of Rule 26(b) or Rule 33 of the Federal Rules of Civil Procedure. In each interrogatory plaintiff is attempting to require defendant, Cohu Electronics, Inc., to provide information in the nature of a discovery as to damages, despite the fact that there has not yet been established that the patent, which is the basis of this suit, is valid and that its claims are infringed. Further, the plaintiff has not yet established a right to an accounting. [70]

The interrogatories are also premature in view of the fact that a Motion for Summary Judgment has been made by the Defendant, Cohu Electronics, Inc., which will be heard on September 15, 1958, by this Court. Should the Defendant, Cohu Electronics, Inc., prevail in this Motion, then the plaintiff will not be entitled to any damages and the responses to the interrogatories would be superfluous.

Interrogatories 1 and 2 respectively request the serial numbers of the Kintel model 114A amplifiers

(the alleged infringing device) sold and manufactured, and Interrogatories 3, 4, and 5 request the names and addresses of purchasers and quantities and serial numbers of the Kintel 114A amplifiers delivered and sold, and how used by the purchasers.

Interrogatories 6 and 7 request whether or not amplifiers having similar characteristics to the Kintel model 114A have been manufactured and sold and not so designated, and the manner and designation of such amplifiers.

Interrogatories 8 and 9 request information as to whether or not Kintel model 114A amplifiers have been sold which do not bear serial numbers and information as to their designation and location.

Interrogatories 10 and 11 request information as to whether or not the Kintel 114A amplifier has been sold to the United States Government and the data as to such sales.

Interrogatory 12 requests the location and other data concerning all Kintel 114A amplifiers not delivered to purchasers prior to August 31, 1958.

Interrogatories 13 through 15 are directed to obtaining data on orders received for Kintel 114A amplifiers prior to August 31, 1958. [71]

Interrogatories 16, 17(a), 17(b), 17(c), 18, 19, 20, and 21 seek information as to Kintel 114A amplifiers which were ordered pursuant to a Government contract.

Clearly, the information sought in all of these

interrogatories is solely for the purpose of discovery on the question of damages. In Zenith Radio Corp. v. Dictograph Products Co., Inc., (D. Del., 1947) 10 F. R. Serv. 33.317, Case 1, 6 F.R.D. 597, the Court quoted with approval from Moore Federal Practice, Page 2640. * * * * * [72]

Respectfully submitted,

COHU ELECTRONICS, INC.,
Defendant,
By LYON & LYON,
/s/ CHARLES G. LYON,
Attorneys for Defendant. [73]

Affidavit of Service by Mail Attached. [74]

[Endorsed]: Filed September 5, 1958.

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF OBJECTIONS TO PLAINTIFF'S INTERROGATORIES BY DEFENDANT, NEELY ENTERPRISES

Plaintiff, on or about August 27, 1958, served on Defendant, Neely Enterprises, interrogatories numbered 1 through 20. Defendant, Neely Enterprises, objects to each and every interrogatory as premature, improper, and beyond the scope of Rule 26(b) or Rule 33 of the Federal Rules of Civil Procedure. In each interrogatory plaintiff is attempting to require Defendant, Neely Enterprises, to provide information in the nature of a discovery as to damages, despite the fact that there has not yet been

established that the patent, which is the basis of this suit, is valid and that its claims are infringed. Further, the plaintiff has not yet established a right to an accounting. [75]

The interrogatories are also premature in view of the fact that a Motion for Summary Judgment has been made by the Defendant, Neely Enterprises, which will be heard on September 15, 1958, by this Court. Should the Defendant, Neely Enterprises, prevail in this Motion, then the plaintiff will not be entitled to any damages and the responses to the interrogatories would be superfluous.

Interrogatories 1 and 2 respectively request the serial numbers of the Kintel model 114A amplifiers (the alleged infringing device) and to whom sold.

Interrogatories 3 and 4 respectively request the quantity and serial numbers of Kintel model 114A amplifiers and how used by the persons to whom sold.

Interrogatories 5 and 6 request whether or not amplifiers having similar characteristics to the Kintel model 114A have been manufactured and sold and not so designated, and the manner of designation of such amplifiers.

Interrogatories 7 and 8 request information as to whether or not Kintel model 114A amplifiers have been sold which do not bear serial numbers and information as to their designation and location.

Interrogatories 9 and 10 request information as to whether or not the Kintel 114A amplifiers have

been sold to the United States Government and the data as to such sales.

Interrogatory 11 requests the location and other data concerning all Kintel 114A amplifiers not delivered to purchasers prior to August 31, 1958.

Interrogatories 12, 13, and 14 are directed to obtaining data on orders received for Kintel 114A amplifiers prior to August 31, 1958.

Interrogatories 15, 16(a), 16(b), 16(c), 17, 18, 19, and 20 seek information as to Kintel 114A amplifiers which were ordered [76] pursuant to a Government contract.

Clearly, the information sought in all of these interrogatories is solely for the purpose of discovery on the question of damages. In Zenith Radio Corp. v. Dictograph Products Co., Inc., (D. Del. 1947) 10 F. R. Serv. 33.317, Case 1, 6 F. R. D. 597, the Court quoted with approval from Moore Federal Practice, Page 2640, [77]

* * * * *

Respectfully submitted,

NEELY ENTERPRISES,
Defendant,
By LYON & LYON,
/s/ CHARLES G. LYON,
Attorneys for Defendant. [78]

Affidavit of Service by Mail Attached. [79]

[Endorsed]: Filed September 5, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF ELBRIDGE C. TITCOMB

State of California
County of San Diego—ss.

Elbridge C. Titcomb, of South Norwalk, Connecticut, being duly sworn deposes and says:

That he is employed by Cohu Electronics, Inc. as their Eastern sales representative;

That he is familiar with the 114A amplifier manufactured by Cohu Electronics, Inc.;

That he has sold 114A amplifiers to the following listed customers who purchased the 114A amplifiers under contracts from the United States Government as indicated by the contract numbers on the customer purchase order. [81]

Customer	Customer Purchase Order Number	Government Contract No.	Quantity	Rating
Edgerton Germeshausen and Grier	J-35108	AT(29-1)1183	6	DO-E2
Columbia Research	P13,918	BXM28163 Subcontract 76	1	DO-A2
Westinghouse	73-A-138174	AT-11-1-GEN-14	1	DO-E1

That he is cognizant of the apparatus wherein the 114A amplifiers purchased were used;

That this apparatus was assembled by each of the customers for and on behalf of the use of the United States Government;

That he has seen the specific apparatus at each of the customer locations wherein the 114A amplifiers were installed;

That this specific apparatus as well as the 114A

amplifiers therein were marked as being the property of the United States Government.

/s/ ELBRIDGE C. TITCOMB.

Subscribed and Sworn to before me this 22nd day of August, 1958.

[Seal] /s/ M. L. HORTON,

Notary Public in and for the County of San Diego, State of California. My Commission Expires October 22, 1961. [82]

Acknowledgment of Service Attached. [83]

[Endorsed]: Filed September 11, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF GERALD CAIN

State of California
County of Los Angeles—ss.

Gerald Cain, of 3939 Lankershim Boulevard, North Hollywood, California, being duly sworn deposes and says:

That he is employed by Defendant, Neely Enterprises, as Field Engineer, at their North Hollywood, California, office;

That he is familiar with the 114A amplifier made by the Defendant, Cohu Electronics, Inc.;

That he knows that one 114A amplifier was sold to North American Aviation, Inc., under the purchase order number R853X-727100 under United States Government contract number AF04(647)171, with a priority rating of DX-A2;

That he is cognizant of the apparatus wherein the 114A amplifier is used; [84]

That he has seen this specific apparatus and has seen that the 114A amplifier installed therein bears a tag indicating that it is the property of the United States Government.

/s/ GERALD CAIN.

Subscribed and Sworn to before me this 4th day of September, 1958.

[Seal] /s/ FERN L. DI JULIO,
Notary Public in and for said County and State. My Commission Expires March 12, 1960. [85]

Acknowledgment of Service Attached. [86]

[Endorsed]: Filed September 11, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF EARL C. DAVIS

State of New Mexico
County of Bernallilo—ss.

Earl C. Davis, of 107 Washington Street, S.E., Albuquerque, New Mexico, being duly sworn deposes and says:

That he is employed by Defendant, Neely Enterprises, as Manager of their Albuquerque, New Mexico, office;

That he is familiar with the 114A amplifiers manufactured by Defendant, Cohu Electronics, Inc.;

That he knows that two 114A amplifiers were sold to the Sandia Corp. under purchase order number

51-4583 under Atomic Energy Commission contract AT(29-1)789 with a priority rating of DO-E2, and a third 114A amplifier was sold to the Sandia Corp. under purchase order number 15-1232 under Atomic Energy Commission contract AT(29-1)789; [87]

That he is cognizant of the apparatus wherein these three 114A amplifiers are used;

That he has seen this apparatus;

That he has seen that the three 114A amplifiers sold to the Sandia Corp. bear a tag indicating that they are the property of the Atomic Energy Commission, which is a department of the United States Government.

/s/ EARL C. DAVIS.

Subscribed and Sworn to before me this 4th day of September, 1958.

[Seal] /s/ ROSWELL MOORE,
Notary Public in and for said County and State.
My Commission Expires Sept. 26, 1959. [88]

Acknowledgment of Service Attached. [89]

[Endorsed]: Filed September 11, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM R. SAXON

State of Arizona
County of Maricopa—ss.

William R. Saxon, of 641 East Missouri Avenue, Phoenix, Arizona, being duly sworn deposes and says:

That he is employed by Defendant, Neely Enterprises, as Manager of their Phoenix, Arizona, office;

That he is familiar with the 114A amplifier manufactured by Defendant, Cohu Electronics, Inc.;

That he knows that one 114A amplifier was sold to the General Electric Company under a purchase order number 022-8757, which also specified that such purchase was made under United States Government contract number AFW33-038-AC-22193;

That he has seen the apparatus in which the 114A amplifier purchased by General Electric Company is incorporated;

That he has seen that this 114A amplifier is a part of a console which has a tag affixed thereto indicating that such console is the property of the United States Government.

/s/ WILLIAM R. SAXON.

Subscribed and Sworn to before me this 9th day of September, 1958.

[Seal] /s/ ANNE M. BORUP,

Notary Public in and for said County and State.
My Commission Expires July 1, 1961. [91]

Acknowledgment of Service Attached. [92]

[Endorsed]: Filed September 11, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD T. SILBERMAN AND THOMAS M. HAMILTON

State of California
County of San Diego—ss.

Richard T. Silberman and Thomas M. Hamilton, each being duly sworn, each for himself deposes and says:

That he is a Vice President of the Defendant, Cohu Electronics, Inc., and each has direct knowledge of the sales and deliveries of all 114A amplifiers manufactured and sold by Defendant;

That a 114A amplifier was sold directly to the United States Naval Ordnance Department under purchase order number 60530/4051 Y 5561-58 under a priority rating of DO-A6;

That the United States Naval Ordnance Department has accepted and paid for the amplifier which they have received; [93]

That accordingly this amplifier has been sold directly to and accepted by a department of the United States Government.

/s/ RICHARD T. SILBERMAN.
/s/ THOMAS M. HAMILTON.

Subscribed and Sworn to before me this 4th day of September, 1958.

[Seal] GERALDINE F. DICKIE,
Notary Public in and for said County and State.
My Commission Expires Nov. 25, 1961. [94]
Acknowledgment of Service Attached. [95]
[Endorsed]: Filed September 11, 1958.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

State of California
County of Los Angeles—ss.

Robert H. Fraser, being first duly sworn, deposes and says that:

1. I am one of the attorneys for the plaintiff, Neff Instrument Corporation.

2. I have read the defendants' motion for summary judgment and the affidavit of Richard T. Silberman and Thomas M. Hamilton in [96] support thereof.

3. On August 26, 1958 and again on September 5, 1958, I visited the offices of The Ramo-Wooldridge Corporation at 5500 West El Segundo Boulevard, Hawthorne, California, and inquired of its employees as to whether or not any Kin Tel Model 114-A amplifiers, manufactured by Cohu Electronics, Inc., had been purchased by The Ramo-Wooldridge Corporation. In response to my inquiry there was made available to me for inspection and copying documents relating to the purchase by The Ramo-Wooldridge Corporation of five (5) Kin Tel Model 114-A amplifiers.

A copy of a first purchase order form made available to me is attached hereto as Exhibit "A". On its face, Exhibit "A" indicates that The Ramo-Wooldridge Corporation issued purchase order No. 24-

37216 to Kintel c/o Neely Enterprises, 3939 Lankershim Boulevard, North Hollywood, California, on January 29, 1958 for the purchase of one (1) amplifier, differential DC, Model 114A. Further, the purchase order of Exhibit "A" on its face does not contain any reference to a government contract number in the space provided therefor and indicates that the order was confirmed by Chas. Roberts on January 28, 1958.

A copy of a second purchase order form made available to me is attached hereto as Exhibit "B". Exhibit "B" indicates on its face that The Ramo-Wooldridge Corporation issued a purchase order No. 24-40862 to Kin Tel c/o Neely Enterprises, 3939 Lankershim Boulevard, North Hollywood, California, dated July 15, 1958, for the purchase of four (4) Kintel Model 114A amplifiers, one (1) 190 module, a 60 cycle chopper (for Kintel Model 114A) and one (1) 400 cycle chopper (for Kintel Model 114-A). The purchase order of Exhibit "B" omits any reference to a government contract in the space provided therefor and indicates on its face that it was [97] confirmed by C. Roberts on July 9, 1958.

Attached hereto as Exhibit "C" is a copy of a document made available to me bearing the heading Kin Tel and designated in the upper right-hand corner as a packing slip. Exhibit "C" on its face indicates that a Model 114A Differential Amplifier Serial No. 1018 and an Instruction Manual were shipped to The Ramo-Wooldridge Corporation in response to purchase order No. 24-37216.

Exhibit "D" attached hereto is a copy of a docu-

ment made available to me designated Purchase Order Change Notice which indicates on its face that an original unit of a Model 114A amplifier was to be returned to Kintel in exchange for an improved model.

Exhibit "E" attached hereto is a copy of a document made available to me designated as Receiving Report No. 24-37216 of The Ramo-Wooldridge Corporation. Exhibit "E" indicates on its face that a Model 114A Differential Amplifier was received by The Ramo-Wooldridge Corporation on May 25, 1958 and that an improved model was received by The Ramo-Wooldridge Corporation on August 22, 1958.

Exhibit "F" attached hereto is a copy of a document made available to me bearing the heading Kin Tel, directed to The Ramo-Wooldridge Corporation, identifying customer order No. 24-40862 and listing four (4) Model 114A differential DC amplifiers, a 190 module, a 60 cps chopper for 114A and a 400 cps chopper for 114A. On its face, Exhibit "F" indicates that Ramo-Wooldridge purchase order No. 24-40862 was confirmed by Kin Tel on July 24, 1958.

Attached hereto as Exhibit "G" is a copy of a document made available to me designated as a receiving report of The Ramo-Wooldridge Corporation, which on its face indicates that items numbered 3, 4 and 2 constituting a 190 module, a 60 cycle chopper for a Kintel Model 114-A and a 400 cycle chopper for a Kintel Model 114-A were received by The Ramo-Wooldridge Corporation on [98] August 11, 1958 and August 28, 1958.

From an inspection of The Ramo-Wooldridge Corporation's documents made available to me, I found no reference to any government contract number nor any statement indicating that amplifiers purchased by The Ramo-Wooldridge Corporation are in any way connected with government use.

4. On August 8, 1958, Mr. Glyn A. Neff and I visited the offices of the defendant Cohu Electronics, Inc., located at 5725 Kearney Villa Road, San Diego, California, for the purpose of inspecting exemplars of production model units of Kin Tel Model 114-A amplifiers. In the offices of Cohu Electronics, Inc. there was made available to us an amplifier labelled as Kin Tel Model 114-A. Mr. Samuel Lindenberg, of the law firm of Lyon & Lyon, counsel for defendants, stated that the amplifier was an engineering prototype model not intended for sale. In addition, there was made available to us in the offices of Cohu Electronics, Inc. a portion of a structure which had been dismantled and was inoperable, but which bore the designation Kin Tel Model 114-A amplifier and bore a plate on which there was printed Serial No. 1009.

5. On August 21, 1958 I visited the West Coast Electronics Manufacturers' Association trade show held at the Pan-Pacific Auditorium, Los Angeles, California, at which time I visited a display of electronics equipment manufactured by Cohu Electronics, Inc. of San Diego, California. There was on display at the trade show an amplifier labelled as a Kin Tel Model 114-A amplifier which was placed in operation and demonstrated by an attendant in

my presence. In addition, there was on display at the trade show an equipment rack containing six (6) amplifiers, each of which bore the designation Kin Tel Model 114-A differential DC amplifier. Small red indicator lights on each of the Model 114-A amplifiers on display [99] were illuminated indicating that the amplifiers were energized for operation. Adjacent the Model 114-A amplifiers on display was a stack of advertising brochures describing the characteristics of Kin Tel Model 114-A amplifiers. These advertising brochures were being generally distributed to the public in my presence and several were given to me. Attached hereto as Exhibit "H" is one such advertising brochure.

6. After inspecting the affidavit of Richard T. Silberman and Thomas M. Hamilton filed in support of defendants' motion for summary judgment, I prepared and forwarded letters inquiring as to the circumstances surrounding the sale of Kin Tel Model 114-A amplifiers to Edgerton Germeshausen & Grier, Lockheed Aircraft Corp. and Sandia Corp., all of whom are named as customers in the aforementioned affidavit. A copy of the letter to Edgerton Germeshausen & Grier is attached hereto as Exhibit "I", a copy of my letter to Lockheed Aircraft Corp. is attached hereto as Exhibit "J", and a copy of my letter to Sandia Corp. is attached hereto as Exhibit "K".

A reply letter was received by me from Mr. A. M. Clark, Vice-President and General Counsel of Edgerton Germeshausen & Grier stating that the government has not given its authorization and con-

sent to the infringement of patents in connection with government contract No. AT(29-1)-1183. Further, Mr. Clark's letter quotes a patent indemnity clause included in the purchase order under which Model 114-A amplifiers were purchased by Edgerton Germeshausen & Grier under which the vendor agrees to indemnify the purchaser and the United States government for the infringement of any letters patent. A copy of Mr. Clark's letter is attached hereto as Exhibit "L".

A reply letter dated August 29, 1958 was received by me from Mr. E. L. Nichols, Division Counsel of Lockheed Aircraft Corp. in [100] which Mr. Nichols stated that he did not feel at liberty to disclose the requested information. A copy of the letter from Mr. Nichols is attached hereto as Exhibit "M".

A reply letter was received by me from Mr. Kimball Prince of the Sandia Corp. dated August 26, 1958 in which he stated that Kin Tel Model 114-A amplifiers were purchased by Sandia pursuant to three separate purchase orders, on one of which purchase orders two (2) Kin Tel Model 114-A amplifiers were purchased making a total of four (4) Kin Tel Model 114-A amplifiers purchased by Sandia Corp. Mr. Prince further stated that the prime contract with the United States Atomic Energy Commission does not contain a specific authorization and consent clause. Further, Mr. Prince enclosed a copy of the Sandia purchase order form of which paragraph 8 constitutes a patent indem-

nity clause under which the seller agrees to indemnify the buyer and the government for infringement of any United States letters patent. A copy of Mr. Prince's letter and the Sandia Corp. purchase order form are attached hereto as Exhibit "N".

7. On August 27, 1958 Interrogatories were filed directed to the defendant Neely Enterprises and the defendant Cohu Electronics, Inc. directed to the discovery of facts relating to the manufacture, sale and use of Model 114-A amplifiers or amplifiers having similar characteristics from which the plaintiff might secure further information concerning the truth of the statements made in the aforementioned affidavit of Richard Silberman and Thomas Hamilton. Defendants have filed objections to plaintiff's interrogatories. No answer to any of the interrogatories has been received by plaintiff's attorneys either from defendants or their counsel.

/s/ ROBERT H. FRASER.

Sworn to and subscribed before me this 11th day of September, 1958.

[Seal] /s/ EMMA C. ARMSTRONG,

Notary Public. My Commission Expires November 12, 1961. [101]

Acknowledgment of Service Attached.

EXHIBIT "I"

[Letterhead of Robert H. Fraser]
August 13, 1958

Government Contracting Officer
Edgerton Germeshausen & Grier
160 Brookline Avenue
Boston, Massachusetts

Dear Sir:

As you may be aware, on May 12, 1958 the Neff Instrument Corporation instituted legal proceedings against Cohu Electronics, Inc. and Neely Enterprises for infringement of U. S. Patent No. 2,832,-848. A particular device manufactured by the defendants which is alleged to infringe is the Kintel Model 114A amplifier.

Although the Neff Instrument Corporation regards the controversy as a private civil matter, involving the defendants only, the defendants have raised as a defense to the action the issue of government liability under Section 1498, Title 28 of the United States Code. In an affidavit filed by Richard T. Silberman and Thomas M. Hamilton of Cohu Electronics, Inc., it is stated that six Model 114A amplifiers have been delivered to Edgerton under your Purchase Order No. J-35108, government contract No. AT(29-1)1183. In order that we may resolve the issue as to whether or not liability properly rests with the defendants to this action or with the government, we would appreciate having certain information relating to the circumstances under which the amplifiers were purchased by Edger-

ton and are being used. Accordingly, will you please write us at your earliest convenience setting forth the following information:

1. Have any Kintel Model 114A amplifiers been purchased by Edgerton other than the ones identified above?

2. Are any of the Kintel Model 114A amplifiers purchased by Edgerton ultimately delivered to the government either separately or as a part of a larger assembly?

3. For what purpose are Kintel Model 114A amplifiers being used by Edgerton?

4. To what extent has the government given its authorization and consent to the infringement of patents in connection with government contract No. AT(29-1)1183?

If it is at all possible we would like to receive a copy of both the purchase order under which the amplifiers were purchased and the government contract. We will be glad to reimburse you for any charges involved in making copies.

We thank you for your cooperation in this matter and regret that it is necessary to trouble you in connection with what we believe to be a strictly private controversy.

Yours very truly,

Robert H. Fraser.

RHF:eca
cc: Neff Instrument Corp.
bcc: Richard B. Hoegh [110]

EXHIBIT "J"

[Letterhead of Robert H. Fraser]
August 13, 1958

Government Contracting Officer
Lockheed Aircraft Corp.
Sunnyvale, California

Dear Sir:

As you may be aware, on May 12, 1958 the Neff Instrument Corporation instituted legal proceedings against Cohu Electronics, Inc. and Neely Enterprises for infringement of U. S. Patent No. 2,832,-848. A particular device manufactured by the defendants which is alleged to infringe is the Kintel Model 114A amplifier.

Although the Neff Instrument Corporation regards the controversy as a private civil matter involving the defendants only, the defendants have raised as a defense to the action the issue of government liability under Section 1498, Title 28 of the United States Code. In an affidavit filed by Richard T. Silberman and Thomas M. Hamilton of Cohu Electronics, Inc., it is stated that 18 Model 114A amplifiers have been delivered to Lockheed under your purchase order No. 52-144, government contract No. NORD(f)1772. In order that we may resolve the issue as to whether or not liability properly rests with the defendants to this action or with the government, we would appreciate having certain information relating to the circumstances under which the amplifiers were purchased by Lockheed and are being used. Accordingly, will you

please write us at your earliest convenience setting forth the following information:

1. Have any Kintel Model 114A amplifiers been purchased by Lockheed other than the ones identified above?

2. Are any of the Kintel Model 114A amplifiers purchased by Lockheed ultimately delivered to the government either separately or as a part of a larger assembly?

3. For what purpose are Kintel Model 114A amplifiers being used by Lockheed?

4. To what extent has the government given its authorization and consent to the infringement of patents in connection with government contract No. NORD(f)1772?

If it is at all possible we would like to receive a copy of both the purchase order under which the amplifiers were purchased and the government contract. We will be glad to reimburse you for any charges involved in making copies.

We thank you for your cooperation in this matter and regret that it is necessary to trouble you in connection with what we believe to be a strictly private controversy.

Yours very truly,

Robert H. Fraser.

RHF:eca
cc: Neff Instrument Corporation
bcc: Richard B. Hoegh [111]

EXHIBIT "K"

[Letterhead of Robert H. Fraser]
August 13, 1958

Government Contracting Officer
Sandia Corp.
c/o White Sands Proving Grounds
Albuquerque, New Mexico

Dear Sir:

As you may be aware, on May 12, 1958 the Neff Instrument Corporation instituted legal proceedings against Cohu Electronics, Inc. and Neely Enterprises for infringement of U. S. Patent No. 2,832,-848. A particular device manufactured by the defendants which is alleged to infringe is the Kintel Model 114A amplifier.

Although the Neff Instrument Corporation regards the controversy as a private civil matter involving the defendants only, the defendants have raised as a defense to the action the issue of government liability under Section 1498, Title 28 of the United States Code. In an affidavit filed by Richard T. Silberman and Thomas M. Hamilton of Cohu Electronics, Inc., it is stated that three Model 114A amplifiers have been delivered to Sandia Corp., one under your Purchase Order No. 15-1232 and two under your Purchase Order No. 51-4583, government contract No. AT(29-1)789. In order that we may resolve the issue as to whether or not liability properly rests with the defendants to this action or with the government, we would appreciate having certain information relating to the circum-

stances under which the amplifiers were purchased by Sandia Corp. and are being used. Accordingly, will you please write us at your earliest convenience setting forth the following information:

1. Have any Kintel Model 114A amplifiers been purchased by Sandia Corp. other than the ones identified above?

2. Are any of the Kintel Model 114A amplifiers purchased by Sandia Corp. ultimately delivered to the government separately or as a part of a larger assembly?

3. For what purpose are Kintel Model 114A amplifiers being used by Sandia Corp.?

4. To what extent has the government given its authorization and consent to the infringement of patents in connection with government contract No. AT(29-1)789?

If it is at all possible, we would like to receive a copy of both the purchase orders under which the amplifiers were purchased, and the government contract. We will be glad to reimburse you for any charges involved in making copies.

We thank you for your cooperation in this matter and regret that it is necessary to trouble you in connection with what we believe to be a strictly private controversy.

Yours very truly,

Robert H. Fraser.

RHF:eca
cc: Neff Instrument Corporation
bcc: Richard B. Hoegh [112]

EXHIBIT "L"

[Letterhead of Edgerton, Germeshausen & Grier, Inc.]

19 August 1958

Robert H. Fraser, Esq.
641 Title Insurance Building
433 South Spring Street
Los Angeles 13, California

Dear Sir:

This is in reply to your letter of August 13, 1958 in which you advise of the pending action of Neff Instrument Corporation against Cohu Electronics, Inc. and Neely Enterprises for infringement of U. S. Patent No. 2,832,848.

Our answers to the questions set forth in your letter are as follows:

1. According to our records, no Kintel Model 114A amplifiers have been purchased by Edgerton, Germeshausen & Grier, Inc. other than the ones covered by our Purchase Order No. J-35108. With respect to the amplifiers purchased under that Purchase Order, only 5 were accepted after late delivery, following which delivery on the sixth was cancelled for failure to deliver on time.

2. The 5 Kintel Model 114A amplifiers purchased by us were delivered to the Government separately.

3. The purpose intended for the 5 Kintel Model 114A amplifiers was their use as pre-amplifiers in selected channels for driving low impedance loads.

4. The Government has not given its authorization and consent to the infringement of patents in connection with Government Contract No. AT (29-1)-1183. On the contrary, Clause 18 of Edgerton, Germeshausen & Grier, Inc. Purchase Order—General Conditions appearing on the back of Purchase Order J-35108 was inserted in the Purchase Order —General Conditions in order to fulfill contractual requirements. Clause 18 reads as follows:

"Patent Indemnity: The Vendor agrees to indemnify the Purchaser and the United States Government, their officers, servants, and employees against liability of any kind (including costs and expenses incurred) for the use of any invention or discovery and for the infringement of any Letters Patent (not including liability arising pursuant to Patent) occurring in the performance of this Order or arising by reason of the use or disposal by or for the account of the Purchaser of the United States Government of items manufactured or supplied under this Order."

We do not believe it is possible to furnish you with a copy of the Purchase Order under which the amplifiers were purchased and a copy of the Government contract. It is our opinion that the Government has a proprietary interest in these documents and, therefore, the right to control dissemination of the same.

We trust that the foregoing information is satisfactory to you.

Very truly yours,

EDGERTON, GERMESHAUSEN
& GRIER, INC.,
/s/ A. M. Clark,
A. M. Clark, Vice-President and
General Counsel.

AMC:jpm [113]

EXHIBIT "M"

[Letterhead of Lockheed Aircraft Corporation]

Robert H. Fraser, Esq. August 29, 1958
641 Title Insurance Building
433 South Spring Street
Los Angeles 13, California

Dear Mr. Fraser:

Your letter dated August 13, 1958 addressed to "Government Contracting Officer, Lockheed Aircraft Corp., Sunnyvale, California" has been referred to me by the Naval Inspector of Ordnance.

Inasmuch as the information requested by you involves the business relationship between us and our vendor, we do not feel at liberty to disclose such information.

Very truly yours,

/s/ E. L. Nichols (efs),
E. L. Nichols,
Division Counsel.

ELN:efs [114]

EXHIBIT "N"

[Letterhead of Sandia Corporation]

Mr. Robert H. Fraser August 26, 1958
Attorney at Law
641 Title Insurance Building
433 South Spring Street
Los Angeles 13, California

Dear Mr. Fraser:

Your letter of August 13 addressed to Government Contracting Officer, Sandia Corp., c/o White Sands Proving Grounds, Albuquerque, New Mexico has been referred to me for reply.

Sandia Corporation operates the Sandia Laboratory at Sandia Base, Albuquerque, New Mexico on a non-profit basis for the Atomic Energy Commission. Under the provisions of all our purchase orders, title to articles purchased passes directly from the seller to the United States Government at the point of delivery. The AEC is our sole customer and consequently anything manufactured for us or purchased by us goes directly to the United States Government. Any items which are retained by us for use in our work nevertheless become property of the United States Government in accordance with the purchase order terms above noted.

To answer your specific questions:

1. The following purchases of Kintel Model 114A amplifiers have been made by Sandia Corporation from Kintel, Inc.:

P. O. 15-1232 dated 4/4/58 1 Kintel 114A
P. O. 51-4583 dated 4/7/58 2 Kintel 114A
P. O. 15-2810 dated 6/2/58 1 Kintel 114A

2 and 3. The amplifiers are used for test pur-

poses at Sandia Laboratory and as above noted, title to those items has passed to the United States Government.

4. Our prime contract with the U. S. Atomic Energy Commission does not contain a specific authorisation and consent clause. However, the entire operation of the Sandia Laboratory is conducted on the basis of the tasks assigned to it by the AEC and therefore all activities of the Laboratory are for the benefit of and at the expense of the AEC.

Unless it is vital I should prefer not to furnish a copy of our prime contract. While it is not classified, we do not like to furnish it to outside parties. I can, however, advise you that it does not contain any provisions relative to the question of authorization and consent. It does specifically provide that Sandia Corporation shall engage in no activities except as provided in the contract with the AEC.

I am enclosing a copy of our purchase order form on which the above three orders were issued. The orders themselves contained no other additional information other than shipping directions.

In accordance with our undertaking with the AEC and our obligations to our suppliers we have advised both the Commission and Kintel, Inc., that a claim has been made by your client with respect to alleged infringement relating to the instrument in question.

Very truly yours,

/s Kimball Prince,

Kimball Prince.

KP/mb
Encl.

[Title of District Court and Cause.]

AFFIDAVIT OF GLYN A. NEFF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

State of California
County of Los Angeles—ss.

Glyn A. Neff, being first duly sworn, deposes and says that:

1. I am the President of the Plaintiff, Neff Instrument Corporation.

2. On August 8, 1958 Mr. Robert H. Fraser and I visited the offices of the defendant Cohu Electronics, Inc., located at 5725 Kearney Villa Road, San Diego, California, for the purpose of [117] inspecting exemplars of production model units of Kin Tel Model 114-A amplifiers. In the offices of Cohu Electronics, Inc. I inspected and operated a Kin Tel Model 114-A amplifier stated by Mr. Samuel Lindenberg to be an engineering prototype model not intended for sale. Also, I inspected a portion of a structure which had been dismantled and was inoperable, but which bore the designation Kin Tel Model 114-A amplifier and a plate having Serial Number 1009 written thereon.

3. On August 21, 1958 I visited the West Coast Electronics Manufacturers' Association trade show held at the Pan-Pacific Auditorium in Los Angeles, California, at which time I visited a display of various electronics equipment manufactured by Cohu

Electronics, Inc. of San Diego, California. There was on display at the trade show an amplifier designated a Kin Tel Model 114-A amplifier which was housed in an individual cabinet. In addition, there was on display an equipment rack containing six (6) amplifiers, each of which was labeled Kin Tel Model 114-A differential DC amplifier. A neon indicator light on each of the Model 114-A amplifiers on display was illuminated indicating that the amplifiers were energized for operation.

4. Over the past few months I have personally inspected issues of trade journals distributed generally to the public. In the course of my inspection, I found advertisements of the defendant Cohu Electronics, Inc. offering for sale to the public Kin Tel Model 114-A amplifiers. Copies of four such advertisements are attached hereto as Exhibits "A", "B", "C" and "D". The advertisement of Exhibit "A" was published in issues of "Electronics" magazine dated March 14, 1958 and April 11, 1958; the advertisement of Exhibit "B" was published in the "Electronics Buyer's Guide Issue" dated June, 1958; the advertisement of Exhibit "C" was published in [118] an issue of "Electronics" magazine dated July 18, 1958; and the advertisement of Exhibit "D" was published in issues of "Electronics" magazine dated May 23, 1958 and June 6, 1958, in an issue of "Western Electronic News" dated August, 1958 and in an issue of the "Grid-Bulletin of the Los Angeles and San Francisco Institute of Radio Engineers" dated July, 1958.

/s/ GLYN A. NEFF.

Sworn to and subscribed before me this 11th day of September, 1958.

[Seal] /s/ EMMA C. ARMSTRONG,
Notary Public. My Commission Expires November 21, 1961. [119]

Acknowledgment of Service Attached. [124]

[Title of District Court and Cause.]

AFFIDAVIT OF BRUCE C. GODWIN

State of California,
County of Santa Clara—ss.

Bruce C. Godwin, of 3065 Maurecia Avenue, Santa Clara, California, being duly sworn deposes and says:

That he is employed as a purchasing agent by the Missile Systems Division of Lockheed Aircraft Corporation, Sunnyvale, California;

That he is familiar with the amplifier devices designated as Model 114-A manufactured by defendant Cohu Electronics, Inc.;

That to his personal knowledge eighteen (18) of said amplifiers have been purchased by the Missile Systems Division of Lockheed Aircraft Corporation by Purchase Order Number 52-144; [140]

That said purchase order was issued pursuant to contract NOrd(F)-1772 between Lockheed Aircraft Corporation and the United States Government;

That said contract NOrd(F)-1772 contains the following provision with respect to title to facilities:

"Title to all of the facilities shall be and remain in the Government, it being understood and agreed that the title to all materials, parts, assemblies, subassemblies, supplies, equipment and other property for the cost of which the Contractor is (or, but for express agreement, if any, set forth in the Schedule, limiting reimbursement for work hereunder to a fixed maximum, would be) entitled to be reimbursed under this contract, shall automatically pass to and

vest in the Government upon delivery to the Contractor or upon the happening of any other event by which title passes from the vendor or supplier thereof, in the case of any such property which is purchased for the performance of this contract, or, in the case of property not so purchased, upon the allocation thereof to this contract by the commencement of processing or use thereof or otherwise. The provisions of this Article, however, shall not be construed as relieving the Contractor from responsibility for the care and preservation of such facilities or as a waiver of the right of the Government to require the fulfillment of any of the terms of this contract.";

That Lockheed Aircraft Corporation is the party referred to as "Contractor" in the above-quoted provision and that Lockheed Aircraft Corporation is entitled to be reimbursed under contract NOrd(F)-1772 for said amplifiers;

That pursuant to the above-quoted provisions, title to said amplifiers is in the United States Government.

/s/ BRUCE C. GODWIN.

Subscribed and Sworn to before me this 11th day of September, 1958.

[Seal] MARIAN LOCKWOOD,
Notary Public in and for said County and State.
My Commission Expires: April 16, 1962. [141]

Acknowledgment of Service Attached. [142]

[Endorsed]: Filed September 12, 1958.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF ROBERT H. FRASER

State of California,
County of Los Angeles—ss.

Robert H. Fraser, being first duly sworn, deposes and says that:

1. I am one of the attorneys for the plaintiff, Neff Instrument Corporation.

2. On September 11, 1958, I executed an affidavit attesting to certain facts in connection with the activities of Cohu Electronics, Inc. and Neely Enterprises in manufacturing, using and selling Kintel Model 114-A amplifiers.

3. I have read the affidavit of Thomas M. Haminton [144] dated September 15, 1958, in which Mr. Hamilton states that the Ramo-Wooldridge Corporation has attempted to purchase four other Model 114-A differential amplifiers and has attempted to secure another in place of Serial No. 1018 but these orders have not been accepted or fulfilled.

4. On September 17, 1958 I visited the offices of the Ramo-Wooldridge Corporation at 5500 West El Segundo Boulevard, Hawthorne, California, and inquired of its employees as to the truth of the matters asserted in Mr. Hamilton's affidavit of September 15, 1958.

In response to my inquiry, there was made available to me for inspection a Kintel Model 114-A am-

plifier in the possession of the Ramo-Wooldridge Corporation, bearing Serial No. 1001, housed in a cabinet to which there was affixed a Ramo-Wooldridge property tag No. 24-3257. In addition, there was attached to the Kintel Model 114-A amplifier in the possession of Ramo-Wooldridge Corporation an inspection certificate.

A copy of each side of said inspection certificate is attached hereto as Exhibit "O". On its face, the inspection certificate indicates that a division of Cohu Electronics, Inc., located at 5725 Kearny Villa Rd., San Diego 11, California tested and accepted the Kintel Model 114-A amplifier, Serial No. 1001, now in the possession of the Ramo-Wooldridge Corporation. The inspection certificate bears the signature of E. Cooper and the date May 12, 1958, along with the initials M.J.K. and a circular inspection stamp.

Attached hereto as Exhibit "P" is a document made available to me by an employee of the Ramo-Wooldridge Corporation comprising a shipping request of the Ramo-Wooldridge Corporation which indicates on its face that a Model 114-A amplifier, [145] Serial No. 1018 was to be exchanged for a later model. Exhibit "P" indicates on its face that the original Model 114-A amplifier, Serial No. 1018, was in the possession of Bob Reed.

Exhibit "Q" is a copy of a document made available to me labeled "Material Special Handling," signed by R. Reed, indicating that the Ramo-Wooldridge Corporation received an improved Kintel Model 114-A amplifier on August 21, 1958.

The information given to me on September 17, 1958 confirmed the undenied facts shown in Exhibit "E" of my previous affidavit which constitutes a copy of a receiving report of Ramo-Wooldridge Corporation. Exhibit "E" indicates that an improved Model 114-A amplifier was delivered to Kintel on August 22, 1958.

/s/ ROBERT H. FRASER.

Sworn to and subscribed before me this 19th day of September, 1958.

[Seal] /s/ WINIFRED A. DAVIE,
Notary Public. My Commission Expires March 7, 1959. [146]

Affidavit of Service by Mail Attached. [150]

[Title of District Court and Cause.]

AFFIDAVIT OF THOMAS M. HAMILTON

State of California,
County of Los Angeles—ss.

Thomas M. Hamilton, being first duly sworn, deposes and says that he is the same Thomas M. Hamilton who has heretofore filed an affidavit in this case dated July 18, 1958, and that he is a Vice President of the defendant, Cohu Electronics, Inc.; that Cohu Electronics, Inc., on May 22, 1958, shipped to Ramo-Wooldridge Corporation one 114A differential amplifier Serial No. 1018; that when said amplifier Serial No. 1018 was shipped to Ramo-Wooldridge Corporation, it was understood by affiant and by the other personnel of Cohu Electronics, Inc., that said amplifier was furnished to Ramo-Wooldridge Corporation on behalf and for the benefit of an agency of the United States Government; that later Cohu Electronics, Inc. became aware of the fact that [152] Ramo-Wooldridge Corporation had no intention of delivering said amplifier Serial No. 1018 to the United States Government and accordingly on August 14, 1958, said amplifier Serial No. 1018 was returned to Cohu Electronics, Inc.;

That Ramo-Wooldridge Corporation has attempted to purchase four other Model 114A differential amplifiers and has attempted to secure another in place of Serial No. 1018, but these orders have not been accepted by Kintel and have not been fulfilled for the reason that Ramo-Wooldridge Cor-

poration has been unable or unwilling to supply a prime government contract number to which these amplifiers can be assigned, and accordingly the receipt of such order and the shipping of such amplifiers would be contrary to the instructions which Cohu Electronics, Inc. has given one and all to the effect that no 114A amplifiers are available except for the benefit of the United States Government;

That the papers attached to the affidavit of Robert H. Fraser reflected the foregoing, and particularly Exhibit F to said affidavit which invoices certain materials to Ramo-Wooldridge Corporation and is in Ramo-Wooldridge Corporation's possession because the materials other than the four 114A differential D.C. amplifiers were actually shipped, particularly those items whose listing is surrounded in ink on said Exhibit F.

/s/ THOMAS M. HAMILTON.

Subscribed and Sworn to before me this 15th day of September, 1958.

[Seal] /s/ BARBARA A. FERNOW,

Notary Public in and for said County and State.
My Commission Expires April 7, 1962. [153]

Affidavit of Service by Mail Attached. [154]

[Endorsed]: Filed September 15, 1958.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW [155]

* * * * *

4. Add the following to paragraph XI:

That said order was confirmed on August 9, 1958. That none of the 114-A amplifiers sold pursuant to the foregoing order and confirmation were manufactured and sold pursuant to a Government contract. [157]

* * * * *

Respectfully submitted,

ROBERT H. FRASER,
RICHARD B. HOEGH,
/s/ By RICHARD B. HOEGH,
Attorneys for Plaintiff. [159]

Affidavit of Service by Mail Attached. [160]

[Endorsed]: Filed October 2, 1958.

In the United States District Court, Southern District of California, Central Division

Civil Action No. 438-58 Y

NEFF INSTRUMENT CORPORATION,
Plaintiff,

vs.

COHU ELECTRONICS, INC. and NEELY ENTERPRISES, Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND SUMMARY JUDGMENT

This cause coming on to be heard upon defendants' motion for summary judgment and the Court being fully advised enters the following findings of fact, conclusions of law and summary judgment:

Findings of Fact

I.

That as to each of the facts hereinafter specifically found, there is no genuine issue.

II.

That this cause is a patent infringement case alleging infringement by defendants of Letters Patent of the United States No. 2,832,848 for Electrical Signal Amplifiers.

III.

That plaintiff, Neff Instrument Corporation, is a [163] corporation of the State of California and has its principal place of business at 2211 East Foothill Boulevard, Pasadena, California.

IV.

That defendant, Cohu Electronics, Inc., is a corporation of the State of Delaware and has its principal place of business at 5725 Kearney Villa Road, San Diego, California, and a place of business at 14743 Lull Street, Van Nuys, California.

V.

That defendant, Neely Enterprises, is a corporation of the State of California and has its principal place of business at 3939 Lankershim Boulevard, Los Angeles, California.

VI.

That the accused device in this case is identified as Cohu Electronics' Amplifier Model 114A.

VII.

That all 114A Cohu Electronics' amplifiers manufactured and sold to date, except in one instance, have been manufactured and sold under specific prime United States Government Contracts.

VIII.

That the United States Government has taken title to all the 114A Cohu Electronics' amplifiers which were sold under the United States Government Contracts.

IX.

That the one instance wherein a 114A Cohu Electronics' amplifier was not manufactured and sold under a separate specific prime United States Government Contract was a sale of a single one of said

amplifiers to the Ramo Wooldridge Corporation, of 5500 El Segundo Boulevard, Los Angeles 46, California, pursuant to their purchase order which was placed and confirmed prior to the issuance (on April 29, 1958) of plaintiff's United States Letters Patent No. 2,832,848. [164]

X.

That the said single one of said amplifiers was returned by The Ramo Wooldridge Corporation to the defendants and a later model 114A amplifier was provided on August 21, 1958.

XI.

That an order for four more of said 114A Cohu Electronics' amplifiers, as well as other items, was placed with the defendants by The Ramo Wooldridge Corporation on or about July 15, 1958.

XII.

That on August 28, 1958, a delivery was made to The Ramo Wooldridge Corporation of only such other items, and no delivery has ever been made of the said four more 114A Cohu Electronics' amplifiers.

XIII.

That advertisements and advertising displays of 114A amplifiers made by the defendants do not constitute offers for sale of these amplifiers to the general public.

Conclusions of Law

I.

That the manufacture and sale by defendants of

the accused devices herein have been manufactures and sales for the United States Government with the authorization and consent of the Government within the meaning of Title 28 U.S.C. Section 1498.

II.

That plaintiff's sole remedy under the premises is by action against the United States in the Court of Claims for recovery of its reasonable and entire compensation for such use and compensation.

III.

That the incidents recited in the Findings of Fact IX, X, XI, and XII are insufficient to remove this action from under [165] the operation of Title 28 U.S.C. Section 1498 and to vest jurisdiction in this court.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby Ordered, Adjudged and Decreed:

1. That the complaint herein be dismissed and that the plaintiff take nothing thereby.

2. That defendants recover their costs and disbursements herein.

Dated this 3rd day of October, 1958.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed and Entered October 3, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Neff Instrument Corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 3rd day of October, 1958.

Dated: October 17, 1958.

Respectfully submitted,

ROBERT H. FRASER,
RICHARD B. HOEGH,
/s/ By RICHARD B. HOEGH,
Attorneys for Plaintiff. [168]

[Endorsed]: Filed October 23, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 170, inclusive, containing the original:

Complaint.

Notice of Motion and Motion for discovery, etc.

Answer.

Notice of Motion and Motion for Summary Judgment.

Minute Order 7/21/58.

Plaintiff's Interrogatories to Defendant Cohu Electronics.

Plaintiff's Interrogatories to Defendant Neely Enterprises.

Notice of hearing of objections to Plaintiff's Interrogatories by defendant Cohu Electronics.

Notice of hearing of objections to Plaintiff's Interrogatories by defendant Neely Enterprises.

Memorandum in support of objections to Plaintiff's Interrogatories by defendant Neely Enterprises.

Memorandum in support of objections to Plaintiff's Interrogatories by defendant Cohu Electronics.

Minute Order 9/8/58.

Affidavit of Elbridge C. Titcomb.

Affidavit of Gerald Cain.

Affidavit of Earl C. Davis.

Affidavit of Wm. R. Saxon.

Affidavit of Richard T. Silberman and Thos. M. Hamilton.

Affidavit in opposition to Defendants' Motion for Summary Judgment.

Affidavit of Glyn A. Neff in opposition to Defendant's Motion for Summary Judgment.

Points and Authorities in opposition to motion for Summary Judgment.

Plaintiff's response to objections to Interrogatories.

Statement of Genuine Issues of Fact.

Affidavit of Bruce C. Godwin.

Minute Order 9/15/58.

Supplemental Affidavit of Robert H. Fraser.

Minute Order 9/22/58.

Affidavit of Thomas M. Hamilton.

Objections to Findings of Fact and Conclusions of Law.

Minute Order 10/3/58.

Clerk's notice of entry of Findings of Fact, etc.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Designation of Record on Appeal.

B. Two volumes of Reporter's Official Transcript of proceedings had on:

July 21, 1958 and September 22, 1958.

I further certify that my fee for preparing the foregoing record, amounting to $2.40, has been paid by appellant.

Dated: November 17, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

In The United States District Court, Southern District of California, Central Division

No. 438-58-Y Civil

NEFF INSTRUMENT CORPORATION, a California corporation, Plaintiff,

vs.

COHU ELECTRONICS, INC., a Delaware corporation and NEELY ENTERPRISES, a California corporation, Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Monday, September 22, 1958

Honorable Leon R. Yankwich, Judge Presiding.
* * * * * [1]*

Mr. Lyon: Now, nothing is subject to the Renegotiation Act unless it is a deal with the United States Government. But, be that as it may, that sales of that one No. 1018—that Serial No. 1018 amplifier to Ramo-Woolridge was in January of 1958.

The patent issued January 29th, so that sale could not constitute a basis for holding that these defendants did not come under Section 1498 of

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Title 28. A sale prior to the issuance of the patent, of course, is not subject to that.

I don't want to mislead the court. The paper work on that sale is dated January 30, 1958.

The Court: The purchase order is dated January 29th, Mr. Lyon.

Mr. Lyon: All right, sir. The acceptance on Exhibit C is dated January 30th. Unfortunately, we did not get around to delivering it until—when was it—some time in May, after the patent had issued. But it is our contention that, of course, the sale was made when the order was accepted, which [6] was prior to the issuance of the patent.

Now, I gave instructions to my client to make sure that none of these amplifiers were sold to anyone except subcontractors or prime contractors of the Government, who had purchased them with the advice and consent—the knowledge and consent of the Government.

The Court: Well, instructions don't mean anything if they are disobeyed.

Mr. Lyon: Well, they weren't disobeyed exactly, your Honor, but here is the funny thing that happened. Feeling that there was some danger in this one amplifier being in the hands of Ramo-Woolridge, to which we could not assign a Government contract number, orders were given to pick it up, and it was picked up in August of this year.

That was after the filing of the motion for summary judgment. And in picking it up, apparently the local people wanted to keep Ramo-Woolridge satisfied, and so they gave him a demonstrator to

take its place. So we have the situation of every amplifier that has been sold to date, with this one exception, has been sold to and become the property of the United States Government.

This one amplifier was sold in January, the deal was made in January prior to the issuance of the patent, the delivery was in May after the issuance of the patent, and then there was an exchange in August. [7]

* * * * *

Mr. Fraser: Your Honor, we believe there are several reasons why the motion for summary judgment should be denied. With the court's permission, we would like to go into each of these in further detail, because we believe there is an ample showing that the motion in this case has been brought in bad faith.

First, the affidavits upon which the motion is based are defective for failure to comply with Federal Rule of Civil Procedure 56(e), which requires that copies of all documents referred to in the affidavits filed in connection with the motion for summary judgment be attached thereto or served therewith.

The first affidavit of Richard Silberman and Thomas [8] Hamilton, as well as the recent affidavit of Elbridge C. Titcomb, each make reference to Government purchase orders and Government contracts, no copy of which has ever been seen by the lawyers for the plaintiff.

* * * * *

The Court: This is a little different than any

other case, or than an ordinary case. This is a case where we have to interpret the statute which the Congress has passed and has decided that actions on patents which are manufactured solely for the Government shall be brought in the Court of Claims rather than as the ordinary action. So summary judgment is based upon that section, and there is no affidavit showing any other sale that I have been able to see or identify. Therefore, when an affidavit states that most of the sales were made on Government purchase orders, and lists them, it isn't necessary that the purchase order be [9] attached. It is an entirely different kind of proposition. This is not a case where you are trying to avoid an issue. This is a case where if they are made for the Government, this court has no jurisdiction over the case. [10]

* * * * *

Mr. Fraser: If the court please, we would like to direct the court's attention to a case, the case of Northill Company v. Danforth, which was decided in the Northern District of California in 1943, 51 F. Supp. 928. In that case 99.41 per cent of the sales were sales to the Government, and only .59 per cent of the sales were to civilians, and it was said by the court that the de minimis doctrine did not apply and the District Court did have jurisdiction of the case.

The Court: I would not follow that. I have held in such circumstances that they are not going to keep a case in this court and give me jurisdiction. I would hold that particularly with only one

sale, as in this case, which was later on cancelled, and that that would not be sufficient to take it out of the statute. Otherwise you are making what has been made a beneficial law a Draconian law.

Mr. Fraser: We have Mr. Lyon's statement that the sale was cancelled, and that a demonstrator was delivered. However, if I didn't visit the West Coast corporation, one would think——

The Court: Well, I would hold that one sale in itself would not take it out of the statute. A sale means an offering to the public, and a single sale would not.

Mr. Fraser: May we direct your Honor's attention to the fact that four additional amplifiers were ordered on Ramo-Woolridge's [13] purchase order, which was confirmed by the defendant, and I have been told they expect delivery on these on September 27th.

The Court: It is one or the other. If a sale is made, it is made as of that particular time.

I don't know why you gentlemen are so afraid of going to the Court of Claims. The Court of Claims has as great power as we have.

Mr. Fraser: We are not afraid of going there, if necessary, but I seriously question whether we could stay in the Court of Claims because I don't think we could make a showing that these sales come within Section 1498. Certainly we didn't have, or, we don't have enough evidence before this court at this time.

The Court: But if I make a finding to that effect, then if you sue them in the Court of Claims,

they are not going to be in a position to question the ruling that they have induced me to make. They can't blow hot and cold between two different tribunals.

They can't say the District Court had no jurisdiction, and then say, "Now, we urge that the Court of Claims has no jurisdiction," because that would not be considered fair conduct before either court. * * * * * [14]

You referred to my last opinion, you remember?

Mr. Fraser: Yes, Avery v. Shuman Company.

The Court: That is right, and then I cited quite a number of cases. But I remember one of the warnings by Judge Fee, saying that it is an easy way to dispose of the calendar, but don't do it.

But this is a peculiar thing, a peculiar statute, where the Congress has chosen to say this.

Now, is there a doubt when a showing is made that one sale may have been made or even four or five sales? That would not be a substantial enough amount to deprive the defendants of their right, and I don't think they could be.

Of course, a motion for summary judgment, if granted, is a final and appealable order, and if it is granted here, you would have not only my granting it, but if I am not sustained, why, you will be back here. If I am sustained, certainly no one can claim in the Court of Claims that when the Court of Appeals and I have said that you did not belong here, that anybody could question it.

It isn't a case of raising an inconsistent position. I had a problem this morning concerning a man

who pleaded [16] certain causes of action which were inconsistent. I said, "So what?" A man has that right, to bring in inconsistent claims, and always has in the common law field.

Mr. Fraser: May we remind your Honor of the Bourne v. Edgecliff case, where there had been a very small number of potentiometers sold to civilians, and your Honor overruled the motion for summary judgment in that case.

The Court: That was an entirely different situation. I remember that case, and I considered that amount to be very substantial in view of the limited scope of the use to which the potentiometers could be put.

I am not deciding this now. I am just raising these points so as to clarify my own thoughts.

Mr. Fraser: We would like to point out to the court that it is hard at this time to rely upon the statements that have been made by the proponents of the motion for the reason that they just filed an affidavit purporting to list all their sales and deliveries. Through a little detective work we found that wasn't true, and they didn't list them all.

Then they took a second look and filed another affidavit, which said that one of them had been delivered, and they got it back, and then a further one was delivered. Then we went forward with a little more investigation work, and found out that was not true.

The affidavits are incomplete, your Honor, and do not [17] resolve all the issues of fact and tell us of all the sales that were made.

How do we know, your Honor, but what there weren't a lot more sales? We have no way of getting to them. We have asked them to answer some interrogatories, but they just say, "Oh, no, we want to answer only on the issue of damages."

We want to place the entire thing before the court, and, again, we return to the fact that there has been absolutely no showing of an authorization or consent to the infringement of patents by the Government on any of these sales.

Certainly, all the communications from the defendant Cohu to Ramo-Woolridge were available to Mr. Hamilton and Mr. Silberman, and yet they executed false affidavits. How can we believe anything they say?

The Court: Of course, the Rules, if they raise any question—well, my thought is that even if they sold five, that would not be substantial enough to deprive the defendants of the benefit of the statute, because there must be a substantial amount, and here there are uncontradicted affidavits that they are all manufactured for a certain purpose, and are used only under contractors. [18]

* * * * *

The Court: Anything further?

Mr. Fraser: Your Honor, the issues of the interrogatories and the motion for discovery.

The Court: I think I am going to grant the motion for summary judgment, which makes it unnecessary to pass upon the other. [23]

* * * * *

Mr. Fraser: May I ask a question, your Honor?

The Court: Yes.

Mr. Fraser: Is the court going to rule that there was authorization or consent as to each one of these sales?

The Court: I don't need to do that, because I think that can be implied from use on Government property, because I have handled many of these cases, and I am not aware that a direct authorization is ever given. If a man is a subcontractor and works on airplanes which are used by the Government, the delivery to him of products which go into them is delivery to the Government, and he, by accepting them, acts as the agent of the Government. That is as far as I will go.

* * * * *

This is an appealable order, and it can be reduced to a very inexpensive one. You record is very short, and you [25] can be on your way. The courts are up to date, and it may well be that in three months you can have a ruling, and nothing will be lost. There would not be much delay in the trial of this case, because I cannot give you a trial date now until spring. [26]

* * * * *

[Endorsed]: Filed November 17, 1958.

[Endorsed]: No. 16266. United States Court of Appeals for the Ninth Circuit. Neff Instrument Corporation, a Corporation, Appellant, vs. Cohu Electronics, Inc., and Neely Enterprises, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 19, 1958.

Docketed: December 3, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16266

NEFF INSTRUMENT CORPORATION, a California corporation, Appellant,

vs.

COHU ELECTRONICS, INC., a Delaware corporation, and NEELY ENTERPRISES, a California corporation, Appellees.

STATEMENT OF POINTS ON APPEAL

The appellant intends to rely upon the following points in support of its appeal from the judgment of the United States District Court:

I.

The District Court erred in granting the motion of the defendants for a summary judgment and in granting summary judgment to the defendants.

II.

The District Court erred in granting summary judgment since genuine issues of material facts existed.

III.

The District Court erred in awarding summary judgment to the defendants since the defendants were not entitled to summary judgment as a matter of law.

IV.

The District Court erred in making its findings of fact I, VII, VIII, IX, XII and XIII and that each of said findings of fact is clearly erroneous.

V.

The District Court erred in refusing to find that the order for four additional 114-A Cohu Electronics amplifiers, placed with the defendants by the Ramo-Wooldridge Corporation on or about July 15, 1958, was confirmed on August 9, 1958, and that none of the 114-A amplifiers sold pursuant to the foregoing order and confirmation were manufactured and sold pursuant to a government contract.

VI.

The District Court erred in refusing to find a lack of authorization or consent given by the Gov-

ernment to the defendants for the infringement of the plaintiff's patent No. 2,832,848 in the manufacture, use and sale of Model 114-A amplifiers.

VII.

The District Court erred in refusing to find instances of manufacture, use or sale of Model 114-A amplifiers other than those set forth in findings of fact VII, VIII, IX, X, XI, XII and XIII.

VIII.

The District Court erred in refusing to find that the affidavits filed by defendants in support of their notice for summary judgment failed to comply with the requirements of Federal Rule of Civil Procedure 56(e) in that no copy of any of the several documents referred to in the affidavits was filed with the District Court or served on the plaintiff.

IX.

The District Court erred as a matter of law in making its conclusions of law I, II and III.

Dated this 8th day of December, 1958.

/s/ ROBERT H. FRASER,
Attorney for Plaintiff-Appellant
Neff Instrument Corporation.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 9, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

To The Defendants, Cohu Electronics, Inc. and Neely Enterprises and to Lyon and Lyon and Charles G. Lyon, Their Attorneys:

You and Each of You Will Please Take Notice that the plaintiff hereby designates the following documents and transcript of proceedings to be included in the record on appeal pursuant to Rule 17 of the Court of Appeals:

Affidavit of Gerald Cain.

Affidavit of Earl C. Davis.

Affidavit of Bruce C. Godwin.

Affidavit of Thomas M. Hamilton.

Affidavit of Glyn A. Neff in opposition to defendants' Motion for Summary Judgment.

Affidavit of William R. Saxon.

Affidavit of Richard T. Silberman and Thomas M. Hamilton.

Affidavit of Elbridge C. Titcomb.

Affidavit in opposition to Defendants' Motion for Summary Judgment (Robert H. Fraser).

Answer.

Complaint.

Designation of Record on Appeal.

Findings of Fact, Conclusions of Law and Judgment.

Pages 1 and 2 and lines 1 through 6 of page 3 of Memorandum in support of objections to Plaintiff's

Interrogatories by Defendant Cohu Electronics, Inc.

Pages 1 and 2 and lines 1 through 6 of page 3 of Memorandum in support of objections to Plaintiff's Interrogatories by Defendant Neely Enterprises.

Notice of Appeal.

Page 3, lines 14 through 18 of Objections to Findings of Fact and Conclusions of Law.

Plaintiff's Interrogatories to Defendant Cohu Electronics, Inc.

Plaintiff's Interrogatories to Defendant Neely Enterprises.

Supplemental affidavit of Robert H. Fraser.

Portions of the transcript of proceedings of Monday, September 22, 1958 as follows:

Page 6, line 9 through page 7, line 25. Page 8, line 13 through page 9, line 4. Page 9, line 15 through page 10, line 4. Page 13, line 3 through page 14, line 23. Page 16, lines 5 through 20. Page 17, line 4 through page 18, line 21. Page 23, lines 6 through 11. Page 25, lines 1 through 13. Page 25, line 24 through page 26 line 5.

Dated this 8th day of December, 1958.

/s/ ROBERT H. FRASER,
Attorney for Plaintiff-Appellant
Neff Instrument Corporation.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 9, 1958. Paul P. O'Brien, Clerk.

No. 16266

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NEFF INSTRUMENT CORPORATION, a corporation,

Appellant,

vs.

COHU ELECTRONICS, INC., a corporation, and NEELY ENTERPRISES, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

ROBERT H. FRASER,
433 South Spring Street,
Los Angeles 13, California,
Attorney for Plaintiff-Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

No. 16266

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NEFF INSTRUMENT CORPORATION, a corporation,

Appellant,

vs.

COHU ELECTRONICS, INC., a corporation, and NEELY ENTERPRISES, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

Upon each of the several grounds specified in the opening brief for plaintiff-appellant, a reversal of the Summary Judgment entered by the District Court is required. Several of the specified grounds and questions presented by the Appeal are totally ignored in the brief of the defendant-appellees. For convenience, and before answering the defendant-appellees' argument, each of the following grounds for reversal is present in the case:

1. At the time of the Hearing in the District Court, numerous genuine issues of material fact were before the Court.

2. The defendant-appellees were not entitled to judgment as a matter of law in the District Court.

3. The defendant-appellees did not establish as a matter of law that the Government had given its authorization or consent to the infringement of patents.

4. The Summary Judgment was based upon an improper finding of fact in that the District Court did not and could not find that there was no genuine issue of material fact present in the case.

5. The District Court summarily resolved genuine issues of material fact present in the case.

6. The application of the doctrine of *de minimis non curat lex* by the District Court is contrary to established rules of law and functions as an unlawful taking of the property of the plaintiff-appellant without due process of law and without just compensation.

7. The defendant-appellees' affidavits did not meet the requirements specifically set forth in Federal Rule 56(e).

8. The District Court erroneously refused to order the defendant-appellees to answer the plaintiff-appellant's interrogatories, thereby foreclosing the plaintiff-appellant from the discovery to which he was entitled.

Apparently, the defendant-appellees acquiesce as to several of the grounds set forth above, inasmuch as their brief contains no argument with respect to grounds 2, 4, 5, 7 and 8. Even though any one of the above set forth grounds ignored by the defendant-appellees is a sufficient basis for reversal by this Court, this reply brief is presented to illustrate the inadequacy of the defendant-ap-

pellees' arguments which were presented as to grounds 1, 3 and 6. Reference is made to the plaintiff-appellant's opening brief for a complete discussion of each of the several grounds of the Appeal.

Genuine Issues of Material Fact.

Notwithstanding the statements of the defendant-appellees to the contrary, the affidavits before the District Court raised numerous genuine issues of material fact which require trial. Conflicts between the defendant-appellees' own affidavits raise issues as to the credibility of the affiants, which issues are in themselves genuine and material to a proper adjudication. Instances of infringing activity nowhere mentioned by the defendant-appellees were brought before the District Court and have never been explained. Even one such issue of fact precludes the granting of Summary Judgment. (*Cee-Bee Chemical Co., Inc. v. Delco Chemicals, Inc.,* decided Dec. 22, 1958, 263 F. 2d 150 (C. C. A. 9).) No authority is cited by defendant-appellees to the contrary. In reviewing this case, it is the duty of this court to scrutinize carefully the affidavits of the defendant-appellees, giving the benefit of every doubt to the plaintiff-appellant. (*Walling v. Fairmont,* 139 F. 2d 318, 322 (C. C. A. 8, 1943).)

The defendant-appellees urge in their brief that the matter of the granting of a Summary Judgment is discretionary .Such a view is incorrect. While the *denial* of the motion may be discretionary, the *granting* of a motion for Summary Judgment is not discretionary since Rule 56 requires that the moving party be entitled to judgment as a *matter of law* and that no genuine issue of material fact be present in the case.

Government Authorization or Consent Not Shown.

At no point in their brief do the defendant-appellees urge that there has been any direct government authorization or consent to the infringement of patents as required by 28 U. S. C. Section 1498. The defendant-appellees' own affidavits merely allege that certain 114A amplifiers were sold "in connection with" Government contracts, and that tags of some sort had been affixed to certain amplifiers. In most instances, if not all, the defendant-appellees sold 114A amplifiers to civilian purchasers. Thus, they were at most subcontractors who were required to secure the authorization or consent of the Government to bring into operation 28 U. S. C. Section 1498.

Authorization or consent is one of the issues of fact in the case before the Court. At most, the affidavits of the defendant-appellees are circumstantial evidence as to the issue of authorization or consent. To arrive at a finding of authorization or consent, from the circumstantial evidence, there must first be drawn an inference of delivery by the civilian purchasers to the Government. Then based upon the inference of delivery, there must be drawn an inference of acceptance by the Government. Then based upon the inference of acceptance, there must be drawn an inference of authorization or consent to the infringement of patents. Surely, such a cascading of inferences to arrive at a finding of the requisite authorization or consent is a fact finding and resolving process which should take place, if at all, at trial. Certainly, it cannot be said that

authorization or consent existed as a matter of law based upon a cascade of inferences drawn from circumstantial evidence.

In contrast to the present case, in each of the several cases cited by defendant-appellees, the District Court took full jurisdiction of the case and a full hearing at time of trial was given in the District Court before rendering a finding of authorization or consent based upon use or acceptance by the Government.

The defendant-appellees urge that Summary Judgment is the appropriate remedy, citing a case which was decided in 1937 prior to the existence of the Summary Judgment procedure and which did not involve a Summary Judgment (*Brooms v. Hardie-Tyne Mfg. Co.,* 92 F. 2d 886 (C. C. A. 5, 1937)) and another case in which there was an appeal from a judgment after trial (*Bereslavsky v. Esso Standard Oil Co.,* 175 F. 2d 148 (C. C. A. 4, 1949).) Although neither of these cases is controlling here, if Summary Judgment is appropriate, the defendant-appellees must comply with the requirements of Rule 56 and the decisions of this Court relating thereto. This they have not done. Certainly the possible application of 28 U. S. C. Section 1498 at the time of assessing damages does not afford a unique basis for departing from the established requirements of the Summary Judgment procedure.

De Minimis Doctrine.

The misapplication of the *de minimis* doctrine by the District Court is urged as being proper by the defendant-appellees without citation of any authority. Never before has this doctrine been applied to dispose of a patentee's rightful cause of action. Within the Ninth Circuit, the correct rule is set forth in *Northill v. Danforth,* 51 Fed. Supp. 928, aff'd. 142 F. 2d 51, which held specifically that the *de minimis* rule did not apply to dispose of instances of non-government sales even where 99.41% of the sales were sales to the government and only .59% of the sales were to civilians. The application of the *de minimis* doctrine raises serious constitutional issues since the denial of the plaintiff-appellant's right to sue would be an unlawful taking of a property right without due process of law and without just compensation (U. S. Const., 5th Amend.).

Without obscuring the true issues before this Court, the plaintiff-appellant and its attorney each take exception to and deny the accusation made in the defendant-appellees' brief. The untruth of the accusation is apparent from the face of the San Diego Union newspaper article (Appx. "C", App. Br.) which indicates that plans for exploitation of the civilian market were disclosed by Cohu Electronics, Inc., one of the defendant-appellees. The Court's attention is directed to the fact that the newspaper article forms a part of the original record in the District Court [see the Objections to the Findings of Fact and Conclusions of Law, Original Record p. 155, not reproduced in the printed Transcript].

Conclusion.

Appellants have brought before this Court grounds demanding reversal of the District Court's entry of Summary Judgment. Numerous genuine issues of material fact were before the District Court. The defendant-appellees did not sustain their burden and were not entitled to judgment as a matter of law. The requisite Government authorization or consent under 28 U. S. C. Section 1498 was not established as a matter of law. The District Court summarily resolved issues of fact. The District Court's judgment is not supported by the findings. The doctrine of *de minimis non curat lex* was erroneously applied. The defendant-appellees' affidavits were defective and should have been disregarded under Rule 56(e). The District Court refused to allow proper discovery by the plaintiff-appellant. On each of the above grounds this Court should reverse the judgment and remand the case to the District Court along with adequate instructions to carry into effect the ruling of this Court at time of trial.

Respectfully submitted,

ROBERT H. FRASER,

Attorney for Appellant.

No. 16,268

In the United States Court of Appeals for the Ninth Circuit

ESTATE OF DELANO T. STARR, Deceased, MARY W. STARR, Executrix, and MARY W. STARR, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
ROBERT N. ANDERSON,
DAVIS W. MORTON, JR.,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

In the United States Court of Appeals for the Ninth Circuit

No. 16,268

ESTATE OF DELANO T. STARR, Deceased, MARY W. STARR, Executrix, and MARY W. STARR, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

---

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 31-42) is reported at 30 T.C. 856.

JURISDICTION

This appeal involves individual income tax deficiencies and Section 294(d)(2) additions to tax determined against Delano T. Starr and Mary W. Starr, then his wife, for the calendar years 1951 and 1952. (R. 31, 44.) Notice of the deficiencies was mailed to the taxpayers on June 30, 1955. (R.

6-12.) On August 31, 1955, within the permitted ninety-day period, the taxpayers filed their petition for review with the Tax Court for redetermination of the deficiencies, within the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 1-23.) Delano T. Starr died after the petition was filed and his widow Mary W. Starr, executrix of his last will and testament was substituted in his stead. (R. 31.) The decision of the Tax Court sustaining the income tax deficiencies for the calendar years 1951 and 1952 was entered on July 7, 1958. (R. 43, 56.) Petition for review by this Court was timely filed on September 19, 1958. (R. 44-48.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Under the facts here obtaining did the Tax Court err in holding that a purported five-year "lease" of an installed $4,960 building sprinkler system, calling for the payment of $6,200 in equal annual installments and for annual renewal "rental" payments of $32 to cover an inspection service charge, was, in substance, a sale, with the result that the respective annual "lease" payments of $1,240, made in each of the taxable years, 1951 and 1952, constituted capital expenditures and not deductible rental expenses, within the meaning of Section 23(a)(1)(A) of the Internal Revenue Code of 1939?

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 23 [As amended by Sec. 121(a), Revenue Act of 1942 c. 619, 56 Stat. 798]. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*—
>
> (1) *Trade or business expenses.*—
>
> (A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * * rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.
>
> * * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

STATEMENT

The pertinent facts, as stipulated (R. 26-27) and found (R. 13-23, 31-32, 33-34) by the Tax Court below, are as follows:

Delano T. Starr and Mary W. Starr were husband and wife during the years involved and resided at 131 East Hillcrest, Monrovia, California. (R. 31.)

For the calendar years 1951 and 1952 Delano T. Starr and Mary W. Starr filed joint income tax re-

turns with the Collector of Internal Revenue at Los Angeles, California. (R. 31.)

The Commissioner determined deficiencies in income tax and additions to tax of Delano T. Starr and Mary W. Starr as follows (R. 31):

Year	Deficiency	Additions to Tax Sec. 294(d)(2)
1951	$1,939.86	$831.73
1952	1,155.14	429.05

Throughout the period here involved Delano owned and operated the Gross Manufacturing Company, a sole proprietorship. Early in 1950 a general manager of the Gross Manufacturing Company suggested to Delano that insurance premiums on the building occupied by the company were quite large and should be reduced. The general manager suggested that some sort of sprinkler system be established in the building. Insurance premiums on the building occupied by the company were estimated to be in excess of $1,000 per year if the building was not protected by a sprinkler system. If the building was protected by a sprinkler system, the insurance premiums per year were estimated to be only $126.29. (R. 31-32.)

On or about April 3, 1950, Delano T. Starr, doing business as Gross Manufacturing Company (hereinafter called the taxpayer), and "Automatic" Sprinklers of the Pacific, Inc. (hereinafter called Automatic), entered into a written agreement which provided for the installation of a sprinkler system. The sprinkler system was installed under and pur-

suant to the written agreement. (R. 32.) This written agreement provided in part as follows (R. 13-23): [1]

LEASE FORM OF CONTRACT

"AUTOMATIC" SPRINKLERS OF THE PACIFIC, INC.
5508 Alhambra Ave.
Los Angeles 32, Calif.

INDENTURE OF LEASE, Made this 3rd day of April 1950 by and between the "AUTOMATIC" SPRINKLERS OF THE PACIFIC, INC., A corporation of the State of California, with an office at Los Angeles, California, hereinafter called the LESSOR and DELANO T. STARR, DBA GROSS MANUFACTURING COMPANY, having principal office at Monrovia, California, hereinafter called the LESSEE.

WITNESSETH:

That in consideration of the mutual covenants LESSOR and LESSEE hereto agree as follows:

ON THE PART OF LESSOR:

1. To install and lease for and during the term of five years from and after approval a wet pipe system of fire extinguishing apparatus, hereinafter referred to as the "system" in certain buildings all as indicated on the plan and shown in the specifications hereto attached in the property owned and occupied by the LESSEE

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[1] Since there are apparent errors in the lease as set out in the typewritten record, the wording of the lease is taken from the official report of the Tax Court opinion. 30 T.C. 856.

located in Monrovia, California. Legal description of the property is as follows:

* * * *

2. The system to be installed by LESSOR will be in accordance with the provisions and conditions of the specifications attached hereto and made a part hereof consisting of two sheets, with the exceptions noted, if any. All materials will be of standard quality and the work herein specified will be done in a thorough and workmanlike manner under the rules and regulations of NATIONAL FIRE PROTECTION ASSOCIATION and subject to inspection and approval by PACIFIC FIRE RATING BUREAU acting as agent of both LESSOR AND LESSEE.

3. LESSOR shall inspect the system at least one (1) time per year after its completion and approval and LESSOR shall repair or replace at its own expense any part if found to be defective or worn out under ordinary usage, provided LESSEE has used due diligence in maintaining the system in proper working order.

ON THE PART OF LESSEE:

4. LESSEE shall pay to the LESSOR, or its successors or assigns at Los Angeles, California, an aggegate rental of SIX THOUSAND TWO HUNDRED DOLLARS ($6,200.00) during the term of this lease, payable as follows:

One Rental Payment of $1,240.00 payable May 1, 1950.

One Rental Payment of $1,240.00 payable May 1, 1951.

One Rental Payment of $1,240.00 payable May 1, 1952.

One Rental Payment of $1,240.00 payable May 1, 1953.

One Rental Payment of $1,240.00 payable May 1, 1954.

All deferred rentals shall bear interest at the rate of 6% per annum after maturity.

5. LESSEE shall use due diligence in maintaining the system in proper working order and in compliance with Insurance Companies' requirements. Should the system become impared on account of lack of diligence on the part of LESSEE in properly maintaining same, or if changes or extensions to the system should be required by the Insurance Companies' on account of changes in construction of, or extensions to the buildings, or on account of changes in the contents of the buildings, LESSEE shall notify LESSOR thereof in writing, whereupon LESSOR shall make the required changes in the system at the cost and expense of the LESSEE as soon after receipt of such notification as is practicable. The rentals becoming due and payable during the remainder of the term of this lease shall thereupon be increased in the amount sufficient to reimburse LESSOR for the materials furnished and labor performed.

6. The rentals stipulated in this lease are based on the assumption that the work of installing the system shall be done only during regular working hours. If overtime work is requested by the LESSEE, the same shall be paid for by the LESSEE as additional rental at the time the next rental payment or payments become due after the performance of such overtime work.

7. LESSEE will furnish at his own expense, as and where required by the LESSOR, all necessary

space for the storage and handling of materials and proper facilities for the speedy and efficient prosecution of the work, including the services of watchman; also light, heat, local telephone service and (when available) elevator service, and unless expressly excepted, all painting, (both as to labor and materials), and permits as required by LESSOR of the installation of the system, and the sufficiency of all thereof both old and new including the property herein proposed to be equipped, is warranted by LESSEE.

8. LESSEE agrees that, if prior to the completion of the installation, the work be discontinued by reason of strikes, lockouts, action of the elements, or any cause not LESSOR'S Fault, there shall, at LESSOR'S option, be due and payable by LESSEE to LESSOR upon its demand, a sum equal to the full aggregate rentals stipulated herein less an allowance to be made by LESSOR for materials, labor and expense not supplied or incurred.

9. LESSEE will supply at his own expense throughout the term of this lease, all necessary water, steam, heat and power required to keep the system in proper working order, including sufficient heat to prevent freezing and will exercise due care and diligence in protecting the same from impairment, injury or destruction, and will promptly give to LESSOR written notice of any impairment, injury or destruction.

10. LESSEE will also promptly pay when due and payable, all taxes and assessments of every kind levied upon the land, buildings and contents protected by the system and in lieu of additional rent, upon the system itself and will keep the system (and the materials and component parts

thereof during installation) at all times full [sic] insured in satisfactory insurance companies to at least an amount equal to the sum of the total unpaid rentals under paragraph 4 against loss by fire, lightning and wind storm, making "loss, if any, payable to "Automatic" Sprinklers of the Pacific, Inc., or its successors or assigns, as its interest may appear"; and deliver to LESSOR the policies for such insurance. In the event LESSEE fails to maintain insurance and/or to deliver to LESSOR the said policies, LESSOR may so insure the premises, including the system for its own benefit to the amount of its interest at the time, and pay the premiums therefore [sic] and upon payment of such premiums by the LESSOR, the same shall forthwith become due and owing from LESSEE to LESSOR without demand. LESSEE shall bear the risk of loss of said property and system from any cause whatsoever.

11. LESSEE will not alter, remove or dispose of, or permit the use by others of, the system, or any part thereof, without the written permission of LESSOR, and no discontinuance of ownership or operation of the plant or premises by LESSEE shall terminate or affect the liability of LESSEE hereunder.

12. It is hereby expressly understood and agreed that title to the system and all its component parts and materials shall be and remain indefeasably vested in "AUTOMATIC" SPRINKLERS OF THE PACIFIC, INC., its successors or assigns, and said system shall not be or be deemed to be, a part of or incorporated into the real estate or be deemed to be a fixture.

THE LESSOR AND LESSEE MUTUALLY AGREE:

13. The following shall be deemed events of default: Failure of LESSEE to make rental payments or otherwise comply with obligations of this lease; appointment of a receiver for LESSEE'S property or business, adjudication of bankruptcy, assignment for benefit of creditors, seizure of the premises herein described by judicial process; the obtaining of a judgment against LESSEE, or the filing of a lien against LESSEE'S property, if said judgment or lien be not satisfied or discharged within ten (10) days thereafter.

14. Upon the happening of an event of default, LESSOR may in so far as permitted by law, resume possession of the system, which LESSEE agrees to deliver upon demand, and LESSOR or assigns shall have full right to enter any building structure or premises where said system, or any part thereof may be, and remove, control and/or shut the water off the same without resorting to legal process, and at the cost and expense of said LESSEE, the amount whereof as well as reasonable attorney fees and court costs in any litigation arising therein, shall be added to the balance then owing hereunder.

15. Upon the happening of an event of default, or in case the premises herein described are destroyed in whole or in part by fire, all remaining rental payments shall, at the option of LESSOR, immediately become due and payable, anything herein contained to the contrary notwithstanding. In case of fire, however, the total amount owing to LESSOR, less such amount as may be paid by the Insurance Companies direct to the LESSOR, shall be subject to discount from

date of payment of fire loss to the date of scheduled maturity at the rate of six per centum (6%) per annum, and LESSEE may have the same rate of discount for any rentals it may be pleased to make before maturity.

16. All rights and remedies hereunder given to LESSOR are cumulative and not exclusive and its failure to exercise any right or remedy upon default shall not be construed as a waiver of the right to exercise the same upon succeeding default.

17. LESSOR shall not be liable for any work or materials not furnished by it, nor any loss or damage by reason of the care or character of any walls, foundations, or other structures not erected by it, and any loss or damage from any cause not the fault of LESSOR, to materials, tools, equipment, or work, while in or about the premises shall be borne by LESSEE.

18. If, in connection with the performance of this lease, any damage be cause [sic], or any claim be made, for which LESSOR may be liable, written notice with an itemized statement thereof, must be given to LESSOR promptly and in any event, within the (10) ten days, thereafter, otherwise LESSOR is released from liability.

19. All notices shall be in writing, served by registered mail upon the parties hereto respectively at their respective offices as hereinbefore set forth, or as hereafter designated in writing by one to the other.

20. The installation of the required number of Automatic Sprinklers, but no Open Sprinklers, is provided for in the specifications heretofore attached. The price shall not include the installation of extra sprinklers due to changes in

the buildings or contents after the completion of LESSOR'S survey.

21. It is mutually understood and agreed that any work or materials not specifically described herein, together with what specifically the LESSEE is to supply, shall be supplied by lessee at his own expense, as and when required by LESSOR for the prosecution of the work. Upon LESSEE'S failure so to do, LESSOR may, at its option, as LESSEE'S agent, supply the same at market prices, and its expense by reason thereof, as well as those resulting from delay, shall be additional to the aggregate rentals mentioned herein and shall be paid to the LESSOR upon demand.

22. LESSOR shall not be liable for any loss or damage from delay or otherwise, due directly or indirectly, to strikes, lockouts, embargoes, transporation conditions, action of the elements, acts, orders, rulings, or restrictions of the U.S. Government, or of any instrumentality thereof, or to any cause beyond LESSOR'S control.

23. LESSOR shall have and is hereby given the right to assign this lease and the rental installments and the title to the system. In the event of any such assignment, LESSEE, hereby waives any right of set-off, defense, or counter-claim, now or hereafter existing in favor of LESSEE against such assignee, without however, in any wise waiting or releasing his right to assert such claim as against LESSOR.

24. That the only agreements, obligations and covenants binding on the parties hereto are those set forth herein.

25. In the event of [sic] any of the provisions of this instrument shall be void or unenforcible under the laws of any state where its enforce-

ment is sought, then it is agreed that the LESSOR may exercise all rights and remedies which are conferred upon conditional vendors or holders of chattel mortgages by the laws of the state in which its enforcement is sought, LESSOR to have the right to elect which remedy it will pursue.

26. LESSEE represents that the fee simple title to the land and/or buildings described in Paragraph 1 is vested in DELANO T. STARR and WIFE, as joint tenants; that LESSEE'S interest in said land and/or buildings is a fee simple title estate; that there are no encumbrances affecting the title to the said land and/or buildings and/or LESSEE'S interest therein.

This representation of fact is made to secure the execution of this lease.

Before any work is started under this lease, LESSEE agrees to procure the assent in writing of all the holders of said uncumbrances [sic] and of all the holders of interest or estates in said land and/or buildings to the provisions of this lease, provided that title to the system of fire extinguishing apparatus herein described shall remain in LESSOR and that said apparatus shall remain personally and not become a part of the realty during the term of this lease.

LESSEE further agrees that no liens or encumbrances of any sort will be placed upon its interest in the said land and/or buildings nor shall said land and/or buildings be sold without first procuring the assent of such lienor, encumbrances or purchaser to the said provisions of this lease.

27. This lease shall become a binding and obligatory agreement upon execution by LESSEE: provided. however, that it may thereafter, at the

option of the LESSOR, be terminated and cancelled by LESSOR at any time within thirty (30) days after said lease has been received at the Los Angeles, California, office of LESSOR. If so terminated and cancelled, LESSOR shall immediately notify LESSEE.

28. At the termination of the period of this lease, if LESSEE has faithfully performed all of the terms and conditions required of it under this lease, it shall have the privilege of renewing this lease for an additional period of five years at a rental of $32.00 per year. If LESSEE does not elect to renew this lease, then the LESSOR is hereby granted the period of six months in which to remove the system from the premises of the LESSEE.

IN WITNESS WHEREOF, the parties herein have subscribed their respective names in duplicate this 3rd day of April A.D. 1950.

"AUTOMATIC" SPRINKLERS OF THE PACIFIC, INC.

By Carl O. Gustafson
President

DELANO T. STARR DBA GROSS MANUFACTURING COMPANY

ATTEST:

Olive L. Monson
June L. Gustafson
W. M. Anderson

The Commissioner allowed depreciation in the amount of $269.60 for each of the years 1951 and 1952, determined on the basis of a total cost of the sprinkler system of $6,200 prorated over a remain-

ing useful life of 23 years for the building from May 1950, when the system was installed. (R. 33.)

During each of the years 1951 and 1952 the taxpayer paid $1,240 to Automatic pursuant to the contract. (R. 33.)

Automatic installed building sprinkler systems on a cash basis and on an installment basis. The cash price of the sprinkler system of the type installed in the building occupied by the taxpayer's business was $4,960. The price of the same building sprinkler system on an installment contract basis with payments extending over a five-year period was $1,240 per year, or a total of $6,200. The average installment contract entered into by Automatic covered a five-year period, but customers purchasing building sprinkler systems have been allowed as long as 15 years to pay for a sprinkler system under an installment contract. Automatic has sold approximately 1,700 sprinkler systems. (R. 33.)

The agreement between the taxpayer and Automatic was recorded on the books of Automatic as a long-term receivable and the profit therefrom was computed in the same manner as the profit from a sale. Automatic has installed approximately 25 building sprinkler systems under agreements of this type, and these agreements were entered into by Automatic to stimulate sales. Automatic has never removed a sprinkler system installed under one of these agreements. (R. 33-34.)

Sprinkler systems sold for cash are only inspected once by Automatic. Sprinkler systems sold under contracts of the type between Automatic and the taxpayer were inspected at least one time per year

for the first five years after installation. If the contract was renewed for an additional five years, Automatic inspected the sprinkler system during the second five-year period for an additional service charge of $32 per year. The contract between the taxpayer and Automatic has been renewed for an additional five years and Automatic has been making an annual inspection of the sprinkler system installed under that contract. The cost of this annual inspection to Automatic is $64 per year. (R. 34.)

The estimated useful life of the sprinkler system installed in the taxpayer's building is 20 years or more. (R. 34.)

Upon the basis of the foregoing facts the Tax Court held that the $1,240 paid by the taxpayer to Automatic in each of the years 1951 and 1952 were not deductible as rental expenses under Section 23(a)(1)(A) of the 1939 Code, but constituted instead capital expenditures. (R. 36, 42.) In view of this ruling the Tax Court also sustained the respondent's additions to the tax under Section 294(d)(2) of the Code.

SUMMARY OF ARGUMENT

The taxpayer entered into a contract with Automatic, a sprinkler system manufacturer, whereby the taxpayer purported to "lease" such a system for a five-year period, making annual payments of $1,240, or a total of $6,200, with the privilege of renewal for five years at an annual "rental" of $32 to cover an inspection service charge. By terms, the taxpayer was required to pay all taxes assessed, bear the risk

of loss, and keep the sprinkler insured at all times in at least an amount equal to the sum of the total unpaid rentals. Automatic was accorded all the rights and remedies of a conditional sales vendor or a chattel mortgagee and could assign its title and right to receipt of the installment payments, in which event the taxpayer waived its rights to set-off, defense, or counterclaim, as against Automatic's assignee, retaining such rights, however, against Automatic. The "lease" recited that title was indefeasibly vested in Automatic and no provision was made to grant the "lessee" an option to purchase. The "lease" did provide that if the taxpayer did not elect to "renew" for the additional five-year period, Automatic would have a six month period in which it could remove the system from the taxpayer's premises. In the event that the taxpayer did or did not elect to renew the "lease" and the six month period should expire with Automatic taking no action to remove, no provision was made as to ownership. Apart from the lease terms, the uncontroverted testimony established that Automatic had sold between 1,700 and 1,800 of its sprinkler systems for cash or on an installment sales basis and had installed only 25 systems under the so-called "Lease Form of Contract". The purchase price, for cash, was $4,960 and the installment sales price, on the customary five-year term basis, was $6,200, the aggregate amount of the $1,240 annual "lease" payments here involved. The $32 annual "rental" during the "renewal" term constituted an established service charge, covering Automatic's cost of making an annual inspection of the installed sys-

tem. On its books, Automatic recorded the profit arising on its "leases" in the same manner as that arising on a five-year installment sale, and finance-wise, both types of contract produced identical amounts, on assignment. All of Automatic's "lease" agreements had been "renewed" and no action had ever been taken to remove a sprinkler from a so-called "lessee's" premises.

Under the above-outlined established facts, the Tax Court correctly held that the purported "lease" amounted, in substance, to a sale of the installed system, with the result that the respective annual "lease" payments of $1,240, made in each of the taxable years, 1951 and 1952, constituted capital expenditures and not deductible rental expenses, within the meaning of Section 23(a)(1)(A) of the Internal Revenue Code of 1939. To secure a rental deduction, the statute requires, alternatively, that the taxpayer must either not be taking title to the property *or* acquiring an equity by reason of the payments made. In construing a sale or a lease, the test is not what the parties label the transaction but, instead, what the parties intend as the legal effect to be produced. Here, the facts compellingly show that the taxpayer acquired an equity in the sprinkler system, with the annual installment payments of $1,240 constituting partial payments on the purchase price. The substance of the so-called "lease" was to give the taxpayer the identical equity interest in the system he would have acquired under a five-year installment sales contract, with the $32 annual payments after the completion of the $6,200 payment constituting

merely a service charge covering annual inspection cost. Under these facts, as the Tax Court correctly observed, the so-called renewal payments of $32 were not even a token payment on the purchase price. However, the annual installment payments of $1,240 were substantially greater than either the depreciated or undepreciated value of the sprinkler system, with the aggregate five-year total amount being equal to the established $6,200 installment sales price. In such circumstances, it is well settled that the taxpayer is properly to be regarded as acquiring an equity in the property. Accordingly, the annual payments of $1,240 do not constitute rental expense, within the established meaning of Section 23(a)(1)(A).

ARGUMENT

The Tax Court Correctly Held, Under the Facts Here Obtaining, That the Purported Five-Year "Lease" of An Installed $4,960 Building Sprinkler System, Requiring Total Payment of $6,200 In Equal Annual Installments and Providing for Optional "Lease" Renewal at an Annual "Rental" of $32, Covering an Inspection Service Charge, Amounted, In Substance, to a Sale of the Installed System, with the Result that the Respective Annual "Lease" Payments of $1,240, Made In Each of the Taxable Years, 1951 and 1952, Constituted Capital Expenditures and Not Deductible Rental Expense, Within the Meaning of Section 23 (a)(1)(A) of the Internal Revenue Code of 1939

We submit that the Tax Court correctly held (R. 42), under this record, that the annual "lease" payments of $1,240, made by the taxpayer during the taxable years, 1951 and 1952, were not deductible as rental expense, within the meaning of Section 23(a)(1)(A) of the Internal Revenue Code of 1939, *supra*.

Under the statute, a taxpayer is entitled to a "Trade or business expenses" deduction for "rentals * * * required to be made as a condition to the continued use or possession * * * of property to which the taxpayer has not taken or is not taking title *or* in which he has no equity." [Emphasis added.] As this Court expressly pointed out in *Oesterreich* v. *Commissioner*, 226 F. 2d 798, 802, if a taxpayer is "either taking title * * * or has acquired an equity, it cannot treat the payments * * * as rental income" inasmuch as "these two provisions of Sec. 23(a)(1)(A) are stated in the alternative and the deduction cannot be availed of" if the taxpayer "has brought itself into either category prohibited by statute." Consistent with such statutory interpretation the Tax Court, as we shall demonstrate, was here correct in holding, under the entire record (R. 40):

> Clearly, the facts show that petitioner acquired a substantial equity in the sprinkler system by the payment of $1,240 during each of the years 1951 and 1952, which interest is essentially the same that he would have acquired if he had purchased the same sprinkler system under an installment sale contract. The substance of the transaction is not changed by the formal contract provision that legal title remained in Automatic [*Viz.*, the so-called "Lessor".]

In construing a transaction as a sale or a lease, for federal income tax purposes, it is well settled that merely labelling it a "lease" does not control the legal consequences if, in fact, the transaction amounts to a sale. *Oesterreich* v. *Commissioner*, *supra*; *Judson Mills* v. *Commissioner*, 11 T. C. 25; *Taft* v. *Com-*

missioner, 27 B.T.A. 808. In determining the proper legal consequences of the transaction, the courts will look to the intention of the parties (R. 35) "as evidenced by the written agreements, read in the light of the attending facts and circumstances existing at the time the agreement was executed." *Haggard* v. *Commissioner*, 241 F. 2d 288 (C.A. 9th); *Benton* v. *Commissioner*, 197 F. 2d 745 (C.A. 5th). As this Court stated in *Oesterreich* v. *Commissioner*, *supra* (pp. 801-802):

> However, the test should not be what the parties call the transaction nor even what they may mistakenly believe to be the name of such transaction. What the parties believe the legal effect of such a transaction to be should be the criterion. If the parties enter into a transaction which they honestly believe to be a lease but which in actuality has all the elements of a contract of sale, it is a contract of sale and not a lease no matter what they call it nor how they treat it on their books. We must look, therefore to the intent of the parties in terms of what they intended to happen.

Accordingly, no merit attaches to the taxpayer's reliance here (Br. 12-22) upon the respective Courts' decisions in the clearly distinguishable circumstances presented in *Benton* v. *Commissioner*, *supra*; *Breece Veneer & Panel Co.* v. *Commissioner*, 232 F. 2d 319 (C.A. 7th); *Abramson* v. *United States*, 13 F. Supp. 677 (S.D. Iowa); and *Haverstick* v. *Commissioner*, 13 G.T.A. 837, or to its attempt (Br. 24) to distinguish *Judson Mills* v. *Commissioner*, *supra*, as a case turning on application of "an arbitrary economic

test." Since the question of the parties intent in a particular case axiomatically constitutes a question of fact, it becomes apparent that none of these factually distinguishable cases can here, in any degree, be regarded as controlling.[2] Principle-wise, however, the proposition is well settled that, regardless of the form of the transaction, so-called "rental" payments must be treated as partial payments on the purchase price of the property involved when, by virtue thereof, the taxpayer acquires, or will acqure, title to, or an equity in the property. *Robinson* v. *Elliot*, 262 F. 2d 383 (C.A. 9th); *Beus* v. *Commissioner*, 261 F. 2d 176 (C.A. 9th); *Quartzite Stone Co.* v. *Commissioner*, 30 T.C. 511.

The facts of this case more than amply support the Tax Court's conclusion (R. 42) that the so-called annual "rental" payments for the installed sprinkler system were not deductible as rental expense. Objectively viewed, they equally compel the conclusion (R. 37-38, 40) that the taxpayer's motive in entering into the "Lease Form of Contract" (R. 13-23) was "obviously to gain the tax benefit of a 'rental' deduction for the annual payments of $1,240", with the "lease" amounting, in substance, to the acquisition, by reason of such payments, of "a substantial equity in the sprinkler system."

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[2] For example, in *Oesterreich* v. *Commissioner*, 226 F. 2d 798, 802-803, where the so-called "lease" agreement called for annual "rental" payments varying from $7,500 to $12,000 and gradually downward again to $7,500, with an option to purchase for $10 after the 68th year, this Court distinguished the *Benton* and *Haverstick* cases, *supra*, by pointing out that "in all of these cases the option price constituted full consideration for the premises or goods acquired."

It is, of course, true that the purported "lease" (R. 13-23) does not contain the customary option to purchase at a fixed price at the conclusion of the specified (R. 13) five-year term. Recitation-wise, paragraph 12 provides "that title to the system and all its component parts and materials shall be and remain indefeasibly vested in "AUTOMATIC" * * * its successors or assigns, and said system shall not be or be deemed to be, a part of or incorporated into the real estate or be deemed to be a fixture." (R. 18.) Paragraph 28 provides that, if taxpayer does not exercise "the privilege of renewing this lease for an additional period of five years at a rental of $32.00 per year", Automatic "is hereby granted the period of six months in which to remove the system from the premises of the LESSEE". (R. 23.) Ambiguously enough, the "lease" is altogether silent as to title, however, in the event that the renewal "privilege" is or is not exercised, with six months elapsing without the "lessor" removing the system from the premises. Clearly, these inconclusive formalistic recitations, coupled with the failure to provide for the ultimate disposition of title in certain altogether forseeable circumstances, make it necessary to examine all of the pertinent "lease" provisions and the here uncontested relevant testimony in order to ascertain the legal effect properly to be accorded the so-called "Lease Form of Contract". Such an examination, we submit, compellingly supports the correctness of the Tax Court's conclusion (R. 40) that the substance of the transaction was to confer on the taxpayer "a substantial equity", arising by reason of the annual

$1,240 installment payments throughout the original five-year term of the purported "lease".

Viewed in their entirety, the record facts more than adequately support the Tax Court's conclusion below (R. 40) that the taxpayer's equity here, "was essentially the same that he would have acquired if he had purchased the same sprinkler system under an installment sales contract." Witness Anderson, the taxpayer's general manager, testified that the taxpayer entered into the so-called "Lease Form of Contract" agreement with Automatic to install the sprinkler system in order to reduce the insurance premiums on the building. (R. 91.) Paragraph 4 of the contract provided that the taxpayer should pay an aggregate "rental" of $6,200 covering a period of five years, payable in annual installments of $1,240 each, beginning May 1, 1950. (R. 14-15.) As indicated above, at the termination of the five year period, the taxpayer was to have the "privilege" of renewing the "lease" for an additional five years at an annual "rental" of $32 per year. (Par. 28, R. 22-23.) Paragraph 10 provided that the taxpayer was to pay all taxes levied against the sprinkler system and maintain insurance on the system, payable to Automatic, in "at least an amount equal to the sum of the total unpaid rentals", with the "risk of loss * * * from any cause whatsoever" falling on the taxpayer. (R. 17.) Paragraph 25 gave Automatic all rights and remedies available to conditional vendors or holders of chattel mortgages in the event any of the provisions of the agreement became void or unenforceable. (R. 21.) Paragraph 23 provided that

Automatic should have the right to assign the "lease" and the "rental installments" as well as the title to the sprinkler system, with the taxpayer waiving any rights to set-off, defense, or counter-claim, as against Automatic's assignee, retaining such rights, however, against Automatic. (R. 21.)

Mr. Carl O. Gustafson and Mrs. Tuttle, the general manager and bookkeeper of Automatic, respectively, testified that the company sold sprinkler systems on both a cash and an installment basis. (R. 111-112, 119-120.) The cash price of a sprinkler system was $4,960 (R. 107), and, when sold under a five year installment contract, it was $1,240 per year, or, as here, under the purported "lease", $6,200 (R. 104-105). Mr. Gustafson testified, further, that the payment of $32 per year for the additional five-year renewal period was a service charge for inspection of the sprinkler system (R. 106-107) with the actual cost of furnishing such annual inspection service amounting to $64 (R. 108-109). Mrs. Tuttle, the bookkeeper, testified that the profit from the so-called "lease" transaction between the taxpayer and Automatic was computed on Automatic's books in the same manner as the profit from a contract installment sale. (R. 118, 119-120.) Mr. Gustafson testified that Automatic (a) had sold, altogether, approximately 1,700 to 1,800 sprinkler systems (R. 115); (b) had "leased" only 25, none of which had ever been removed from a "lessee's" premises and all of which had been "renewed" for inspection purposes (R. 109-110); and (c) had sold, on occasion, under installment terms providing for payment over an

outside period of 15 years, with "about five years" constituting the "average" installment term (R. 111). He testified, further, that the estimated useful life of a sprinkler system was "20 years or more." (R. 110.) On redirect examination, he stated that the "Lease Form of Contract" had been devised by Automatic to stimulate sales. (R. 123.)

Under all of the foregoing established and uncontroverted facts, we submit the Tax Court was more than amply justified in (a) viewing the formal recitation of Automatic's "indefeasibly vested" title (par. 12, R. 18) as "a factor to be considered" but not here controlling on the issue of the deductibility of the payments as rent (R. 37-39); (b) regarding the contract provision requiring Automatic to repair or replace defective or worn-out parts at its own expense (par. 3, R. 14) as "no more than a warranty customarily to be found in contracts of sale" (R. 39); (c) treating the asserted sprinkler installation purpose of reducing insurance rates as immaterial to the sale or "lease" issue, since the result, under a five year installment sales contract calling for identical annual payments would be the same (R. 37-38); and (d) concluding that (R. 40):

> the absence of a specific option to purchase upon payment of a further sum is immaterial where, as here the entire purchase price of the sprinkler system was accounted for in the initial five-year period and the payment of $32 per year thereafter represented a mere service charge for annual inspection of the system.

Moreover, we submit the Tax Court was correct in concluding that the taxpayer's so-called "lease" obligations to (a) pay taxes and insurance (R. 17); (b) grant Automatic all customary conditional vendor rights and remedies (R. 21); and (c) pay annual "lease" installments aggregating the identical $6,200 purchase price offered by Automatic on a five-year installment sales basis (R. 104-105), viewed compositely with the other established facts, indicate (R. 39) "that petitioner acquired a substantial equity in the sprinkler system", with the result that the "rental" payments of $1,240 per year (R. 36) "were intended to be and were in fact partial payments of the purchase price". Even if title has not passed to the "lessee", such "rental" payments may, of course, be treated as capital expenditures where the facts, as here, indicate that the "lessee" is acquiring not merely the right to use the property but a substantial equity in its ownership. *Judson Mills* v. *Commissioner, supra.* As the Tax Court observed, the fact, standing alone, that the annual "rental" payments "dropped off to $32 per year after the first five years" constituted "strong evidence" that the $1,240 annual installment payments made over the initial five year period "were intended as something more than the mere payment for the use of the property. (R. 37-38.) Moreover, the $1,240 payments are, here, substantially greater than either the depreciated or undepreciated value of the sprinkler system,[3] with, as

[3] The Tax Court pointed out (R. 41-42) that, here, the Commissioner has allowed depreciation of $269.60 on the sprinkler system for each of the years 1951 and 1952 (R. 9,

noted above, the aggregate payments during the first five years being equal to the established five year installment conditional sales price. (R. 104-105.) On the other hand, the $32 annual payments after the first five years do not represent (R. 41) "even a token payment on the purchase price of the system" but, instead, are intended to reimburse Automatic for its annual inspection service (R. 106-107). As the Tax Court stated in *Chicago Stoker Corp.* v. *Commissioner*, 14 T.C. 441, 445: [4]

> If payments are large enough to exceed the depreciation and value of the property and thus give the payor an equity in the property, it is less of a distortion of income to regard the payments as purchase price and allow depreciation on the property than to offset the entire payment against the income of one year.

For all the reasons given above, we submit that the Tax Court was correct in holding (R. 42), under all the facts here obtaining, that (a) the installment payments of $1,240 for each of the taxable years 1951 and 1952 were not rental expenses within the meaning

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11). Accordingly, in result, only $970.40 of the 1951 and 1952 annual payments of $1,240 was disallowed as a deduction in each year. Since subsequent depreciation deductions over the remaining useful life of the sprinkler system will be allowable for those years in which only the $32 service charge is payable, the Tax Court observed (R. 42) that "respondent's determination results in a less distorted picture of petitioner's income than if deductions of $1,240 per year are allowed in the first five years of the sprinkler system's useful life."

[4] Cited with approval by this Court in *Oesterreich* v. *Commissioner*, 226 F. 2d 798, 803.

of Section 23(a)(1)(A) of the Internal Revenue Code of 1939; and (b) the Commissioner's determination of additions to tax under Section 294(d)(2) of the 1939 Code (26 U.S.C. 1952 ed., Sec. 294) was correct.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

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No. 16,270

In the

United States Court of Appeals

For the Ninth Circuit

EDGAR HAROLD TEAGUE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief for Appellant Edgar Harold Teague

Appeal from the United States District Court for the Northern District of California, Southern Division

Honorable LOUIS E. GOODMAN, Judge

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INDEX

AUTHORITIES

STATUTES

TREATISE

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STATEMENT OF JURISDICTION

On July 31, 1958, defendant Edgar Harold Teague was indicted by a grand jury of the U. S. District Court for the Northern District of California. The grand jury charged a violation of 18 U.S.C. § 659 (1952) *Theft from a foreign shipment* (Record 3). Upon trial the defendant was found guilty and the court imposed judgment on October 15, 1958. Defendant filed a notice of appeal on the 15th of October, 1958, (Record 7-8), and this Court has jurisdiction of that appeal under 28 U.S.C. § 1291 (1952).

STATEMENT OF THE CASE

This is an appeal from a sentence of a $1000 fine, a thirty-day prison term, and eleven months probation, imposed upon the defendant after a jury found him guilty of violating 18 U.S.C. § 659 (1952). The government's case, simply stated, was that Teague stole five coils of copper wire from Pier 50 in San Francisco, while the wire was being shipped from that city to Kobe, Japan.

At the trial it was undisputed that, early in 1957, Federated Metals Company of San Francisco sold some coils of used copper wire to a broker in New York (Record 40). The broker in turn sold the wire to the Tatsuta Industrial Company in Japan (Record 80). On March 6th of 1957, Federated Metals sent the coils by trucker to Pier 50 of the American President Lines in San Francisco. The coils were counted on arrival, and they were then stowed at the end of the pier (Record 60-61, 70-71). The wire was subsequently loaded aboard the *S.S. President Taylor,* (Record 171), and on the 9th of March the vessel sailed for Japan. She reached Yokohama without touching any intermediate port, and then proceeded to Kobe where the shipment of copper wire was unloaded (Record 101, 104-05).

The defendant Teague testified as follows: He was a painter leaderman employed by American President Lines; and after work on the night of March 6, 1957, he drove home alone via Berry Street in San Francisco. At the intersection of Berry and the Embarcadero he saw five coils of wire which were lying in the roadway. He took the wire and put it in his car, with the possible intention of selling it if it should prove to be worth anything. When he found the wire there was a tag on it marked: "FH 3916 Kobe 174," but it carried no other marks of identification or ownership. Teague denied that he stole this wire from Pier 50 or, indeed, from any other place (Record 238-41).

James Daniels, on orders from his stepfather Teague, subsequently drove Teague's car to the Richmond Iron and Metal Company to price the wire (Record 137-40). While he was getting it priced, a suspicious policeman, who decided that Daniels had no business owning such a commodity, impounded the wire. These are the coils that now appear as Plaintiff's Exhibit 2 (Record 129-34).

It was not disputed that Teague was working near Pier 50 on the night of March 6th and that his car, parked with several others, was close to the place where the shipment for Kobe was stored (Record 145-47).

The government did not attempt to dispute the fact that no shortage had been claimed by the ultimate consignee in Japan, or anyone else, (Record 53, 160-61), but relied for its proof of a shortage upon the finding of the tag, the similarity of the wire, and various counts and weighings of the coils. Employees of Federated Metals testified that 186 coils were sent to Pier 50, and that shipping tags were attached to each of the coils (Record 41, 61). Testimony of a clerk showed that one of the tags bore the notation "FH 3916 Kobe 174", and that this tag was similar in appearance to that found in the five coils that came into Teague's possession (Record 60). An employee of the Pacific Maritime Association testified that the 186 coils arrived at Pier 50, (Record 72), and a shipping clerk testified that he had checked 186 coils aboard the *S.S. President Taylor* (Record 174). This shipping clerk said that, while he had not made an exact count, he had found no shortage (Record 179-80). The captain of the *S.S. President Taylor* then testified that the shipment had been counted at two different ports in Japan. A count in Yokohama showed a total of 181, but a subsequent check in Kobe showed a total of 186 coils (Record 103, 111-13). This testimony was supported by a

cargo boat note (Defendant's Exhibit F), showing that 186 coils were checked off the *S.S. President Taylor* in Kobe.

The evidence also showed variations in the weights of the coils obtained on different occasions. The coils found in Teague's car weighed 460 pounds when weighed by a public weighmaster (Record 212). But, according to the evidence of the government, the police weighed the five coils and the weight was 531 pounds (Record 35). A shipping clerk of Federated Metals testified that the total shipment weighed 22,000 pounds before being sent to Pier 50 (Record 62). But the only evidence offered of the weight upon arrival in Japan was a Japanese weighmaster's certificate, and the weight shown on this certificate was 21,501 pounds (Record 122).

The reception of this paper in evidence is the first of the two errors assigned on this appeal. The second question is whether the government presented sufficient proof of an actual theft—a corpus delicti—to take the case to the jury. Both these questions are raised by the taking of this appeal.

SPECIFICATION OF ERRORS

1. The Admission in Evidence of the Purported Japanese Weighmaster's Certificate.

This four-page typewritten document is Plaintiff's Exhibit 8. It bears the title: Nippon Kaiji Kentei Kyokai, Japanese Marine Surveyors and Sworn Measurers Assoc. Licensed by Japanese Gov't. It contains a purported record of the arrival and weighing at the Hyogo Pier, Kobe, of 186 coils of copper scrap from the *S.S. President Toylor* [sic] on March 24th, 1957. In addition there is a listing of the weight, in kilograms and pounds, of the total shipment and the individual coils. The document is supposedly signed by the manager of the Kobe branch of Nippon Kaiji Kentei Kyokai.

The document was one of a number included in defendant's Exhibit A for identification, but the defendant made no use of it. It was offered in evidence by the U. S. Attorney while Captain Johnson, the master of the *S.S. President Taylor* was on the stand. The record shows the following exchange:

> "Mr. Petrie: I notice among the papers that are Defendant's Exhibit A for identification a copy of a certificate of measurement and/or weight. Can you identify that document for us?
>
> Mr. Roos: We object to it, your Honor, as incompetent, irrelevant and immaterial, and hearsay." (Record 117).

After some discussion, but no further testimony, the court stated that the certificate was admitted, (Record 119), and the defense objected as follows:

> "Mr. Roos: Objected to as incompetent, irrelevant and immaterial, and hearsay, and not a business record of American President Lines, no opportunity, no foundation laid whatsoever to show that it was accurate." (Record 119-20).

The court then said that on that basis he would strike Defendant's Exhibit F (previously admitted in evidence without objection and by stipulations (Record 115-117)), and the following exchange took place:

> "The Court: Do you want your record to remain?
>
> Mr. Roos: The captain identified my record, your Honor. He hasn't identified this.
>
> The Court: All he did was to say that that was the record [the cargo boat note—Defendant's Exhibit F] * * * furnished to him by the Japanese checkers.
>
> Mr. Roos: But he identified it. He hasn't identified the weight certificate." (Record 120).

2. The Denial of Plaintiff's Motion for Acquittal Under Rule 29, Made at the Close of the Government's Case, Renewed After the Defendant's Case and Again After the Jury Verdict.

The defendant's motion for judgment of acquittal following the Government's case was denied (Record 205). A similar motion, made after the defendant's case, was similarly denied (Record 266). The motion was made again after the jury's verdict and once more denied (Record 294).

SUMMARY OF ARGUMENT

Before it could obtain a conviction, the government was required to prove that some wire was stolen and that Teague was the thief. The evidence against him can be put into three catagories: Possession of similar wire and a shipping tag, circumstantial evidence of theft via opportunity, and evidence of a shortage in the shipment. The government was not able to offer any evidence that the consignee had complained of a shortage and, for proof that there was in fact a loss, fell back on evidence of discrepancies in weights and counts. The key piece of evidence offered by the government on this issue was a four-page document purportedly prepared by a Japanese weighing firm. This paper was clearly hearsay and inadmissible unless brought under some exception to that rule. This four-page document received in evidence as Plaintiff's Exhibit 8 was *never even identified,* let alone established as within the business record exception. In fact, the paper was introduced during the testimony of an American President Lines ship's captain who said he had *never seen it before* in his life.

Once it was admitted in evidence, the government made full use of the paper. Much was made of it in the argument to the jury and it went to the jury room, so there is little doubt that the jury considered it in their deliberations.

Since the use of the paper was clearly prejudicial and it was erroneously admitted, the trial court must be reversed.

If the argument that the paper was improperly admitted is accepted, the remaining evidence fails to sustain the conviction. The government was required to prove the loss before it could obtain a conviction; and this, as any other element of its case, had to be proved beyond a reasonable doubt.

The test to be applied was: *Must reasonable men, as a matter of law, agree that a hypothesis that the full shipment arrived in Kobe* **could reasonably** *be drawn from the evidence?*

If the answer was "Yes" the motion for acquittal should have been granted. The government stipulated that as many coils arrived in Kobe as left San Francisco. On its face this evidence would seem to make inevitable the conclusion that the coils that came into Teague's hands came from some other source than the Kobe shipment. The government suggested that the jury might infer that there had been a criminal conspiracy resulting in some extra coils and, indeed, some such inference was essential to its case. But no evidence was introduced showing that this conspiracy had in fact happened. The defendant submits that to allow the jury to engage in such extravagant hypothesis, on such slim facts, was beyond what is allowable in a criminal case.

ARGUMENT

1. The Trial Court Erred in Admitting in Evidence a Purported Certificate of a Japanese Weighmaster.

A. THE PAPER WAS NEITHER IDENTIFIED NOR AUTHENTICATED.

The crime charged against Teague was that he stole some coils of copper wire which were being sent from San Francisco to Kobe, Japan. Teague did not deny that five

coils of wire were found in his car by the Richmond police, and that he came by the wire without the consent of its owner. He testified, under oath, that he found the wire lying on a highway in the dockside area of San Francisco. The contrary theory of the government was that he stole it from an American President Lines pier, where it was being held for shipment on the *S.S. President Taylor*. Whatever may be thought of Teague's morality in light of his own testimony, he was not indicted for misappropriating five coils of wire someone had left lying in a San Francisco street. He was indicted for theft from a wharf of wire that was part of a foreign shipment (Record 3). Whatever possible quarrel the State of California may have with Teague, the United States had to prove that he stole from a wharf part of a shipment moving in foreign commerce.

Now, if the jurors had believed Teague's testimony about where he found the wire, they could have decided it came from the Kobe shipment, and yet still have found him not guilty. They could have believed that someone else took the coils from the dock and that Teague's action in picking up the wire off a public highway did not show the kind of intent that makes a larceny. Unfortunately for Teague he could offer no witness to corroborate his testimony about finding the wire. On the other hand, nor could the government offer any direct evidence to show that Teague took the wire from the dock. The government offered circumstantial evidence on this issue; but all it showed was that Teague, among many others, had the opportunity to take some wire from the particular shipment that went to Japan.

Since the jury convicted Teague they must, presumably, have disbelieved his testimony that he found the wire. But they must also have believed that the coils were part of the San Francisco to Kobe shipment. The trial judge so instructed them:

> "The Government must also prove that the coils were part of * * * this alleged foreign shipment. And you must also find * * * whether or not the Government has sustained its burden of proving that these coils were a part of the foreign shipment." (Record 285-86).

If the government had failed to offer sufficient evidence to support its assertion that the coils found in Teague's car were from the Kobe shipment, then the trial court would have necessarily granted defendant's motion for acquittal. So the prosecution set about proving a loss from the shipment.

As it happened, the buyers of the shipment of wire made no complaint of any loss, and the government's proof of such a loss was based upon such items as the presence of the shipping tag, the similarity of the coils, and various weighings and countings of the shipment to Japan. Logically enough, the government asked the jurors to compare the weight of the shipment at its origin in San Francisco with its weight at its destination at Kobe. In addition, the government asked the jury to compare the number of coils in the shipment at San Francisco with the number of coils supposedly in the shipment at Yokohama, an intermediate port of call for the *S.S. President Taylor*. The government showed, by the testimony of the purchasing agent of Federated Metals, that 186 coils of wire were in the Kobe shipment when it was trucked to the American President Lines dock (Record 41). It also showed by the testimony of the master of the *S.S. President Taylor* that he, the mate, and a checker, counted 181 coils in the shipment when the vessel reached Yokohama (Record 103). However, the defense was able to show by the same witness that when the ship reached Kobe there were still 186 coils aboard (Record 112-13). This was done by the testimony of the master, by the "Dear

Dunc" letter written by him, (Defendant's Exhibit E), and by the introduction of a cargo boat note, Defendant's Exhibit F, a business record of the *S.S. President Taylor* (Record 117).

At this point in the trial the government attempted to show how there still could have been a theft in San Francisco by introducing evidence of the weight of the shipment when it reached Kobe. The theory of the government, as later expounded in argument to the jury, was that someone had made little coils out of big ones. If this were true, of course, the weight of the shipment in Kobe would be less than when weighed in San Francisco. Previous testimony had shown that the weight in San Francisco was 22,000 pounds (Record 41). So by this time the crucial question in the jurors' minds must have been: *What was the weight in Kobe?*

At this critical stage in the trial, Captain Johnson, the master of the *S.S. President Taylor*, was still on the stand. The U. S. Attorney, Mr. Petrie, asked the captain if he could identify a four-page document which was handed to him (Record 117). This paper was what is now Plaintiff's Exhibit 8, the admission of which in evidence is one of the subjects of this appeal. The only witness who testified about the document was Captain Johnson, and he was questioned as follows:

> "Mr. Petrie: I notice among the papers that are Defendant's Exhibit A for identification a copy of a certificate of measurement and/or weight. Can you identify that document for us?"

At this point there was an objection, but the paper was admitted without any testimony. Cross examination followed:

"Mr. Roos: Captain, did you ever see this weight certificate before it was shown to you in court here this morning, Plaintiff's Exhibit No. 8, a purported certificate of weight and measurement?

Capt. Johnson: *I did not.* I normally don't see those records." (Emphasis added). (Record 122).

So the document remained unidentified. It would appear to be unnecessary to labor the point that the failure to identify the document left it "nothing but a nothing." Its admission in evidence was therefore clearly erroneous. *Summers v. McDermott,* 138 F.2d 338, 339 (3d Cir. 1943); *International Aircraft Trading Co. v. United States,* 109 Ct. Cl. 435, 75 F. Supp. 261 (1947) (alternative holding); 7 Wigmore, Evidence § 2130 (3d ed. 1940).

In addition, if the document was to be admissible the hearsay objection had to be overcome. Evidently the "business record" exception was in the mind of the trial court. In the federal courts this exception is statutory and the relevant words are:

> *"Record made in regular course of business* * * * In any court of the United States * * * any writing * * * made as a * * * record of any act * * * shall be admissible as evidence of such act * * * if made in the regular course of any business, and if it was in the regular course of such business to make such * * * record * * *" Business Records Act. 28 U.S.C. § 1732 (1952).

It has been said that the sufficiency of the foundation for a document is a matter of discretion for the trial judge, and that he will only be reversed if guilty of abuse of this discretion. *Arena v. United States,* 226 F.2d 227, 235 (9th Cir. 1955), *cert. denied,* 350 U.S. 954 (1956). But it has never been suggested that a document can be admitted without *any* evidence to identify it.

The Supreme Court has not had occasion to rule on the precise issue involved in this appeal, but a similar question has been considered in this circuit. The question arose in a civil anti-trust suit for damages caused by a conspiracy to refuse to supply petroleum products. At the trial numerous letters, telegrams, memoranda, and reports were admitted in evidence. Some of these papers were handwritten, some typewritten, and some printed. Although there was no question that the papers came from the defendant's files, the defense objected that no foundation had been laid. On appeal to this Court the case was reversed and remanded on the grounds that many of the papers were not made in the regular course of business, it was not in the regular course of business to make them, and some were mere opinions. *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958).

It is impossible to determine the theory, if any there was, upon which the trial judge admitted the alleged Japanese weight certificate in evidence. The record, while Captain Johnson was on the stand, reads as follows:

> "Q. [Mr. Petrie] I notice among the papers that are Defendant's Exhibit A for identification a copy of a certificate of measurement and/or weight. Can you identify that document for us?
>
> Mr. Roos: We object to it, your Honor, as incompetent, irrelevant and immaterial, and hearsay * * *
>
> Mr. Petrie: * * * This is a business record just as the boat note or anything else.
>
> * * * * * * *
>
> Mr. Petrie: This is the certificate of the Japanese weigher at Kobe, your Honor, which confirms that 186 coils were unloaded.
>
> * * * * * * *
>
> The Court: This is also a part of the—
>
> Mr. Petrie: Company's records.

The Court: —company's records. I have admitted, at your request, the cargo boat note by the checkers. I will admit the —

Mr. Roos: The cargo boat note, if your Honor please, was a ship's record.

The Court: No, it wasn't. [*But see Record 114-15*] I didn't admit it as a ship's record: I admitted it as a record of the Japanese checkers who furnished it to the boat. This is another one that they furnished to the boat.

Mr. Roos: That is not furnished to the boat, your Honor. It was not furnished until this investigation commenced.

Mr. Petrie: That is not true. [*But see* affidavit of Bernard Petrie, Assistant U. S. Attorney, filed with this court in opposition to Defendant's application for bail pending appeal wherein Mr. Petrie swears on page 4 that: "the weight certificates had been sent to American President Lines in San Francisco by an employee in Japan."]

* * * * * * *

Mr. Petrie: The Government offers the certificate of weight in evidence.

The Court: Admitted.

Mr. Roos: Objected to as incompetent, irrelevant and immaterial, and hearsay, and not a business record of American President Lines, no opportunity, no foundation laid whatsoever * * *

* * * * * * *

Mr. Roos: It has never been identified; it is hearsay." (Record 117-21).

Thereafter, Captain Johnson admitted that he had never previously seen the purported certificate of weight (Record 122).

In point of fact the contested paper came to court in the records of the San Francisco office of American President Lines. It was brought to the court by a Mr. Wheeldon in

response to defendant's blanket subpoena. There is not a word of testimony in the record to explain the presence of the certificate in the files of American President Lines. Courts have several times pointed out that the mere presence of documents in a file does not make them admissible under a business records act. As was said in *Standard Oil Company of California v. Moore, supra,* 251 F.2d at 215 n. 34:

> "The existence of a document or its presence in the file of a corporation does not, without more, render it admissible under § 1732."

This holding should be contrasted with that in *Olender v. United States,* 237 F.2d 859 (9th Cir. 1956), *cert. denied,* 352 U.S. 982 (1957). That case was a successful prosecution for income tax evasion where, on appeal, the defendant argued that the admission in evidence of certain shipping memoranda was erroneous. This court rejected the argument, pointing out that the memoranda had been identified by an executive vice-president, and that he testified that the records were made in the usual course of business.

But in Teague's case the government failed to meet the standards declared by this court. There was no evidence offered to show what the paper was, the circumstances of its origin, or how it came to San Francisco. Though the paper may look authentic, its very look of substance must have been to the greater prejudice of the defendant, should it prove to be false. See 3 Wigmore, Evidence 174 (3d ed. 1940).

B. THE ADMISSION OF THE WEIGHT CERTIFICATE SUBSTANTIALLY AFFECTED THE RIGHTS OF DEFENDANT.

If the admission of the weight certificate was error, then the conviction must be reversed unless this Court can say

that the "substantial rights" of the defendant were not affected 28 U.S.C. § 2111 (1952).

The question of what are "substantial rights" in a criminal case has often been before the Supreme Court. Perhaps the most extensive consideration was undertaken in *Kotteakos v. United States,* 328 U.S. 750 (1946). The Court in that case reversed the Second Circuit for holding a variance between indictment and proof to have been error but not reversible error. Mr. Justice Rutledge stated that the question for a court of appeals to decide was not whether without the error the record supported the conviction, but what was the effect on the jury of the thing done wrong. He went on to say:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id* at 764-65.

This, then, is the question to be asked on this appeal: *Can one say "with fair assurance, after pondering all that happened" that the jury was not "substantially swayed" by the weight certificate?*

The disputed evidence in this case was not testimony which might only have a temporary effect; but, instead, consisted of four pages of writing which were taken into the jury room. What was said and done in that juryroom is

hidden behind the general verdict, but there is surely grave doubt that the jury did not look at those four sheets of paper. Moreover, the persuasive effect on a jury of something that can be seen and felt has been pointed out many times. Wigmore strikingly commented on the dangers involved:

> "[A] material object, particularly a writing, when presented as purporting to be of a certain origin, always tends to impress the mind unconsciously, upon the bare sight of it, with the verity of its purport. Does it purport to be a contract signed by A & B? We immediately assume it to be such; though it may be the merest forgery. Does it purport to be a picture of the place of murder? We look at it with an interest based on the unconscious assumption that it *is* that house. In short, we unwittingly give the document the credit of speaking for itself; though no human being has yet spoken for it. Now this tendency has be be rigorously repressed * * *" 3 Wigmore, Evidence 174 (3d ed. 1940).

Moreover the particular writing involved was climactically introduced at the end of the most intensely fought legal battle of the trial. The argument over its admission occupies seven pages of the record and cannot have failed to impress the jury with the vital importance attached to the paper by the government.

This importance was emphasized by the trial judge who commented to the jury, (Record 121), that the weighmaster's certificate was "equally entitled to the consideration of the jury" as was Defendant's Exhibit F, the cargo boat note, which showed the receipt by the checkers of 186 coils of copper scrap. The court stated (incorrectly), that both records were made by the same Japanese company. This importance the U. S. Attorney emphasized by his argu-

ment to the jury. He stated how the government viewed the problem of the origin of Teague's coils:

> "Now we come to the crucial question in the case: Were the five coils of copper wire part of this foreign shipment?" (Record 271-72)

In making his argument on this self-designated "crucial issue", the U. S. Attorney adopted the theory that someone engaged in a criminal conspiracy to cover up for the defendant.[1] Some such theory was necessary in the face of uncon-

---

1. The atmosphere in which this trial was conducted can be gleaned from a single incident, though there were many. In a discussion without the presence of the jury the trial judge stated that he would not permit the U. S. Attorney to make his "little coils out of big ones" conspiracy argument to the jury. Mr. Petrie had asked for a stipulation that the Defendant belonged to the same union as the seaman aboard the President Taylor. The court indicated that this fact was irrelevant. The following exchange occurred:

> "The Court: What you want is to establish the fact that the defendant belongs to a union which also includes seamen in it?
>
> Mr. Petrie: As making it more likely that someone aboard the President Taylor would help the defendant out by covering for him and converting five of these coils into ten between Yokohama and Kobe.
>
> * * * * * * *
>
> Mr. Petrie: I have got two thoughts about that, your Honor, to show it is relevant; (1) it would make it more likely that the defendant would be better known to the people aboard the President Taylor and that they would know him so that he would have somebody to contact; secondly, it would make it more likely that some seaman aboard the President Taylor would be willing to risk his own interest to protect the defendant.
>
> The Court: Mr. Petrie, I think I would hold against you on that. *I think that is in the realm of speculation. I don't think you would be entitled to make that argument.*
>
> Mr. Petrie: I will abide by your decision on it, your Honor. That was the thought that I had.
>
> The Court: *That would be in the realm of speculation and conjecture and would not, I think, fall reasonably within the area of circumstantial evidence.*
>
> Mr. Petrie: I will not pursue it." (Record 263-64)

Then in his argument to the jury Mr. Petrie proceeded to make exactly this argument. Defendant's counsel naturally objected and

tradicted testimony that 186 coils left San Francisco and 186 coils arrived in Kobe. So he continued:

> "We call [sic] in addition confirmation of that. The weight, according to Mr. Calkin's weighing at Federated Metals, was 22,000 pounds. *You can look* at Government's Exhibit 8. *That is the certificate of the Japanese weighmaster at Kobe.* It carried a weight of 21,501 pounds, a differential of about 500 pounds." (Emphasis supplied.), (Record 274).

It is, of course, true that the Japanese weight certificate was not the only evidence connecting the five coils found in Teague's car with the shipment to Japan. The other items

---

was slapped down by the court in the presence of the jury in no uncertain terms.

> [Mr. Petrie:] "Then we have the strange occurrence that by the time the boat reaches Kobe three days later, there are 186 coils. You will recall that the coils are of irregular size. Now, if you are satisfied, as I submit you must be, that only 181 coils left San Francisco—if you are satisfied as to that, then the only explanation for their still being 186 coils at Kobe after the count of 181 in Yokohama *is that someone aboard that ship made ten coils out of five*—some seaman, some friend of the defendant's made ten coils out of five—*to cover up for the defendant* and to protect him.
>
> Mr. Roos: If your Honor please, I hate to interrupt counsel's argument, but *is it proper for him to ask the jury to indulge in speculation and surmise?*
>
> The Court: I don't think there is any reason for the interruption.
>
> Mr. Roos: I am sorry, your Honor.
>
> The Court: Counsel can make arguments from the evidence just as you can.
>
> Mr. Roos: All right.
>
> Mr. Petrie: You knew, ladies and gentlemen, that 186 coils were shipped by Federated. Mr. Calkins told you that. You know that 186 coils and no more were received at the dock at American President Lines, because Delehanty, the checker, told you that he checked each of the coils off; is that so? That's why I say to you if you are satisfied that these five coils came from that shipment and that they never left San Francisco, then the only explanation for there being 186 coils at Kobe is that *someone aboard the President Taylor made ten coils out of five to cover up for this defendant.*" (Record 273-74) (Emphasis supplied).

of evidence used by the U. S. Attorney in his argument to the jury were:

1. The testimony that Teague's coils were very similar to those in the shipment.
2. The shipping tag found in the coils.
3. The count of 181 coils at Yokohama.

However, the three items above could well have failed to convince a jury beyond a reasonable doubt in the face of the 186 coil count at Kobe. To overcome this possibility the final piece of evidence from which the government argued was the weight certificate. Without this the jury might have found for the defendant's innocence, and it may well have been the final weight that tilted the scales against Teague.

But, in any event, the test as formulated by the Supreme Court is not whether the remaining evidence will support the charge. See *Kotteakos v. United States, supra,* 328 U.S. at 765. And the mere fact that the erroneously admitted evidence was cumulative to other evidence is not sufficient to make the error harmless. *Krulewitch v. United States,* 336 U.S. 440, 444-45 (1949). This court's duty is not to weigh the remaining evidence to see whether it supports the judgment, but to weigh the effect of the error, if such it was, on the minds of the jury. *Kotteakos v. United States, supra* at 764; *Prevost v. United States,* 149 F.2d 747 (9th Cir. 1945); *c.f. United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 239, 242 (1940). See also dissent of Frank, J. in *United States v. Antonelli Fireworks Co.,* 155 F.2d 631, 647-53 (2nd Cir.), *cert. denied,* 329 U.S. 742 (1946). In the present case there can be no doubt as to the substantial effect of the weight certificate—but if there be *only a reasonable question* as to whether it substantially affected the result that doubt would, under the Supreme Court's test, require reversal.

If the jurors followed the suggestion of the U. S. Attorney to look at this exhibit (Record 274), and it seems likely

that they would, then there can be little doubt that its effect on their minds was substantial. This being so, if the paper was erroneously admitted, the conviction must be reversed. Apart from the effect upon the minds of the jury on the issue of shortage or no shortage, the defendant's case must have been damaged in other ways. As pointed out before, the government not only had to show that Teague's coils came from the Kobe shipment, but that he stole them from that shipment. Teague's position was that the five coils that came into his possession did not come from the Kobe shipment and, in any event, he found the coils and did not steal them. But once having found against him on the issue of the origin of the coils with the aid of improperly admitted evidence, the jury might easily have been swayed against Teague on the issue of how he came by the coils. Finally, in some ways a juror's attitude toward a defendant is influenced by the trial judge's attitude towards defendant's counsel. The loss of the argument over the admission of the weight certificate must have damaged, to some unascertainable extent, the defendant's power to convince a jury of his innocence.

Whether or not the erroneous admission into evidence of a particular document is prejudicial generally entails an examination of the entire transcript to determine the climate and atmosphere of a trial. Prejudice is frequently cumulative. If a trial judge has been scrupulously fair to a defendant, an appellate court may conclude that a single, albeit serious, error in the admission or rejection of evidence was not prejudicial. Such was not the case here. (See *United States v. Ah Kee Eng*, 241 F.2d 157 at 161 (2nd Cir. 1957) concerning similar conduct by a trial court). To detail every instance wherein the trial court departed from neutrality to assist the prosecution would unduly lengthen this brief. Summary references to the record must suffice:

1. In numerous instances the trial court unduly restricted cross-examination by defendant's counsel when he sought to have documents identified and to delve into such vital matters as the number of coils in the shipment, the initial weight of the shipment out of Federated Metals, and the number of coils loaded and checked aboard the vessel (E.g., Record 55-58, 63, 65, 67-69, 107).

2. Defendant's counsel was not permitted to question witnesses concerning their knowledge of documents unless the witnesses had personally prepared the document. (E.g., Record 55-56, 58, 67-68, 74, 80, 86-89).

3. The trial judge made the amazing statement to the jury that the U. S. Attorney had no duty to bring out the whole truth but had only the duty to secure a conviction. (Record 75-76).

4. The trial judge permitted the U. S. Attorney to read to the jury from documents during the course of the trial but would not permit defendant's counsel to do so (Compare Record 110-111 with 121-122).

5. The trial judge repeatedly sustained objections to questions of defendant's counsel when in fact no objection had been made by the U. S. Attorney. (Record 55, 56, 106-107, 162).

6. Evidence of custom and practice was admitted when offered by the prosecution but excluded when offered by the defense. (Record 68, 89, 166).

7. Disparaging comments on evidence presented by the defense and on the defendant's theory of the case were made at frequent intervals, (Record 56, 57, 63, 76, 107, 108, 112-113, 120, 121, 212), always in the presence of the jury.

Any doubt as to the existence of animosity toward the defense was removed by the trial court's remarks during argument on the motion for acquittal, (Record 201, 203), by the ill-concealed attempt to secure a confession with proba-

tion as the bait, (Record 295-299), and by the in-chambers reception of adverse information concerning the defendant from "an important labor leader." (Record 295-296). This animosity reached its culmination in the erroneous denial of bail on appeal, (Record 299-300), which was promptly corrected by this Court.

In conclusion, the erroneous admission of the purported Japanese weight certificate must have exercised substantial influence upon the verdict of the jury. The weight shortage theory replaced the starting prosecution theory of a coil count shortage. The theory of a coil count shortage was abandoned by stipulation upon becoming untenable through introduction of the "Dear Dunc" letter and the cargo boat note. The Japanese certificate is, on its face, an impressive document which could not but impress the average juror. Its effect upon the jury must be weighed with the numerous actions of the trial court whose cumulative and total effect cannot be denied.

II. The Trial Court Erred in Failing to Grant Defendant's Motion for Acquittal Since, Without the Weight Certificate, the Government Failed to Prove a Corpus Delicti.

It is beyond dispute that, before a man may be convicted of a particular crime, the crime itself must have been committed by someone. In the case of larceny this self-evident requirement is met by proof of the two elements of a corpus delicti:

(1) Some property was lost by an owner; and

(2) The loss was caused by a felonious taking. *Vaughn v. United States*, 272 Fed. 451, 452 (9th Cir. 1921); *People v. Siderius*, 29 Cal. App. 2d 361, 366, 84 P.2d 545, 549 (1938).

The loss by a felonious taking of *some coils* from the Kobe shipment was therefore a necessary element of the government's case against the defendant. And all necessary elements had to be proved beyond a reasonable doubt. *Davis*

v. United States, 160 U.S. 469, 493 (1895); *Karn v. United States,* 158 F.2d 568, 572 (9th Cir. 1946). If the evidence brought before the jury was insufficient on that issue, then the defendant's motion for a judgment of acquittal should have been granted. The controlling rule was:

> *Rule 29. Motion for acquittal. (a) Motion for judgment of acquittal* * * * The court on motion of a defendant * * * shall order the entry of judgment of acquittal of one or more offenses * * * after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

The circumstantial evidence, viewed most favorably to the prosecution, on the question of whether there was a felonious taking from the shipment may be summarized as follows:

1. 186 coils were counted before being shipped from Federated Metals for Pier 50.
2. 186 coils were counted on arrival at Pier 50.
3. Captain Johnson, his first mate, and a Japanese checker counted 181 coils at Yokohama.
4. Teague admitted coming into possession of five coils, with a tag in the coils apparently identical to a tag attached to a coil of the Kobe shipment.
5. The coils that came into Teague's possession were very similar to those shipped to Kobe.
6. *It was stipulated* that 186 coils arrived at Kobe (Record 115-116).

If the state of the evidence is such that no reasonable jury could find beyond a reasonable doubt that the defendant is guilty of the crime charged, (or, as here, that the crime had, in fact been committed) then a motion for acquittal must be granted. *Cooper v. United States,* 218 F.2d 39 (D.C. Cir. 1954); *Curley v. United States,* 160 F.2d 229 (D.C. Cir.), *cert. denied,* 331 U.S. 837 (1947).

From the circumstantial evidence of the shipping tags, the 186 count in San Francisco, and the 181 count in Yokohama standing alone, it could be inferred that there was a felonious taking; *but* from the arrival of 186 coils at Kobe (a stipulated fact) such an inference becomes untenable. We are not here dealing with the weighing of evidence, nor the balancing of conflicting inferences to determine whether an ultimate fact in a civil case has been proved by a preponderance of the evidence. The question here is whether there is sufficient evidence, *as a matter of law,* to permit a reasonable jury to find, *beyond a reasonable doubt,* that the full shipment did not arrive at Kobe or, stated another way, that the 5 coils found in the defendant's automobile were a part of the San Francisco to Kobe shipment. Again, we are not here concerned with the finding of a fact based upon a preponderance of the evidence but with whether or not the evidence is sufficient to justify, *as a matter of law,* the finding of an ultimate fact *beyond a reasonable doubt.* As stated by this court in *Remmer v. United States,* 205 F.2d 277, 287-88 (9th Cir. 1953), *vacated on other grounds,* 347 U.S. 227 (1954), a motion for judgment of acquittal is properly denied "if reasonable minds *could* find that the evidence excludes every reasonable hypothesis but that of guilt * * *." But here "reasonable minds" could not so find. Here "there is no evidence upon which a reasonable mind might fairly conclude [proof of a corpus delicti] beyond a reasonable doubt * * *" *Cooper v. United States, supra,* 218 F2d at 41.

It is not unlikely that three men trying to count coils in the crowded hold of a ship in Yokohama would fail to find five of them. It is beyond the realms of possibility that a checker in Kobe could count 186 when there were only 181. To escape the logic of this the government suggested that someone made little coils out of big ones. But there is no evidence in the record to show that this event actually took place. The government had the burden of producing evi-

dence to prove the corpus delicti and to withstand the motion for acquittal; and surely that burden was not satisfied by such imaginative resourcefulness as creating accessories after-the-fact out of thin air. The inference that someone made some extra coils is essential to the government's case for, unless the jurors believed this, they could not have found there was a loss and so a crime. Such a prodigious inferential leap is, as the trial judge once ruled (Record 263-264), beyond the area of the legally permissible inference. (See footnote 1, p. 17, *supra.*) So the defendant submits that, as a matter of law, no reasonable mind could exclude the reasonable possibility that there was no loss from the Kobe shipment and no corpus delicti. Stated another way, no reasonable mind could be satisfied, beyond a reasonable doubt, that a theft from the Kobe shipment occurred. This being so, the motion for acquittal should have been granted.

CONCLUSION

The admission of the unidentified and unauthenticated weight certificate was erroneous and prejudicial.

Without the weight certificate the evidence was legally insufficient to prove a loss and thus a corpus delicti. Therefore, the motion for a judgment of acquittal should have been granted.

The judgment of the District Court must be reversed and a judgment of acquittal entered by this Court.

Respectfully submitted,

April 8, 1959

Leslie L. Roos
John Victor Tilly
Roos, Jennings & Haid
Attorneys for Defendant-Appellant

EXHIBITS

No. 16271

United States
Court of Appeals
for the Ninth Circuit

MARY OZEROFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—3-6-59

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

DEAN LONEY, of Powell & Loney,
Box 125,
Kennewick, Washington,

Attorney for Appellant.

DALE M. GREEN,
U. S. Attorney;

ROBERT L. FRASER,
Assistant United States Attorney,
P. O. Box 1494,
Spokane, Washington,

Attorney for Appellee.

United States District Court for the Eastern District of Washington, Southern Division

Civil No. 1287

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARY OZEROFF,

Defendant.

COMPLAINT

Comes now the Plaintiff United States of America by William B. Bantz, United States Attorney for the Eastern District of Washington and Robert L. Fraser, Assistant United States Attorney for said District, and for cause of action against the above Defendant alleges as follows:

I.

That the above-named Plaintiff at all times herein mentioned, through the Atomic Energy Commission, its agency, was the owner and manager of the premises hereinafter described, located in Richland, Washington, under the authority of the Atomic Energy Act of 1954, Public Law 703, 83rd Congress, Chapter 1073, Second Session, and specifically Subsections 161e and 161g thereof.

II.

That since the 1st day of May, 1957, the Defendant has held and resided in that certain dwelling and premises, owned by Plaintiff, known as 1525

Hains Street, Richland, Washington, without a lease and without the Plaintiff's permission.

III.

That since the 1st day of May, 1957, the reasonable value of said dwelling, premises, and appliances therein is and has been $64.98 per month, but Defendant has paid no rental whatsoever therefor.

IV.

That during the month of May, 1957, the Plaintiff, with an expectation known to Defendant that Plaintiff would be paid therefor as part of the rent, supplied Defendant at the said premises with domestic water of the reasonable value of $1.50.

V.

That Defendant paid nothing for the domestic water furnished as stated in Paragraph IV. [1*]

VI.

That on the 28th day of October, 1957, Plaintiff herein caused to be served upon the Defendant a notice requiring said Defendant to vacate said premises at the expiration of the 20th day of November, 1957.

VII.

That in compliance with the statute of the State of Washington, to wit: RCW 59.12.040, the notice referred to in Paragraph VI was served upon Defendant at the dwelling described in Paragraph II

*Page numbering appearing at foot of page of original Certified Transcript of Record.

by affixing a copy of said notice in a conspicuous place, to wit: on the door of said dwelling, and by sending through the mail with proper postage prepaid a copy addressed to Defendant at 1525 Hains Street, Richland, Washington; that neither Defendant nor any other person was found at the said premises at the time of said service.

VIII.

That despite the notice to vacate said premises as hereinbefore set forth, Defendant has failed and refused to vacate as demanded.

IX.

That the Defendant is now unlawfully in possession of said premises and is guilty of unlawful detainer.

Wherefore, Plaintiff prays for judgment against said Defendant as follows:

1. That said Defendant be adjudged guilty of unlawful detainer of said premises.

2. That a writ of restitution be issued ousting the Defendant from the possession of said premises and restoring possession thereof to this Plaintiff.

3. That the Plaintiff have judgment against this Defendant for unpaid rental on said premises from May 1, 1957, to the date of eviction at the rate of $64.98 per month, for $1.50 as the fair value of domestic water furnished, and for Plaintiff's costs and disbursements herein.

4. For such other and further relief as to the court may seem just and proper.

/s/ WILLIAM B. BANTS,
United States Attorney;

/s/ ROBERT L. FRASER,
Assistant United States Attorney.

[Endorsed]: Filed December 4, 1957. [2]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and by way of answer to the complaint of the plaintiff admits, denies and alleges as follows:

I.

Answering Paragraph I defendant admits the same except that it denies that The United States of America, plaintiff, was the manager of said premises.

II.

Answering Paragraph II, defendant denies the same, except defendant admits that she resides at that certain dwelling known as 1525 Haines Street.

III.

Defendant denies each and every allegation contained in Paragraph III of plaintiff's complaint, and alleges that the rental has been repeatedly offered to the plaintiff and plaintiff has refused same.

IV.

Answering Paragraph IV, defendant admits the same.

V.

Answering Paragraph V defendant denies the same.

VI.

Answering Paragraph VI defendant denies the same.

VII.

Answering Paragraph VII, defendant denies the same.

VIII.

Answering Paragraph VIII defendant denies the same, except that defendant admits she still continues to reside at said premises. [4]

IX.

Answering Paragraph IX of plaintiff's complaint, defendant denies the same.

Wherefore having fully answered, defendant prays that the complaint of the plaintiff be dismissed.

POWELL & LONEY,

By /s/ DEAN LONEY,
Attorney for Defendant.

[Endorsed]: Filed December 12, 1957. [5]

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Comes now the United States, Plaintiff in the above-entitled action, and under Rule 36, Rules of Civil Procedure, requests Defendant within 10 days after service of this request to make the following admissions for the purposes of this action only and subject to all pertinent objections to admissability which may be interposed at a future hearing or trial:

1. (a) That she is now living in the premises known as 1525 Hains Street, Richland, Washington, without a lease.

(b) That she has never held a lease of those premises.

2. That the said premises are owned by the United States of America.

3. (a) That about October 28, 1957, she returned to 1525 Hains Street, Richland, Washington, after being absent therefrom and then found affixed to the front door at those premises a document requiring her to vacate the premises in November, 1957.

(b) That about October 29, 1957, she received through the United States mail a document requiring her to vacate the premises in November, 1957.

4. That she did not comply with the requirement of the documents described in Paragraph 3, above.

5. That the document attached to this request as "Exhibit A" is genuine and that it is a true copy of the documents described in Paragraph 3, above.

6. That since May 1, 1957, and at all times since that date the reasonable rental value of the dwelling, premises and government-owned appliances at 1525 Hains Street, Richland, Washington, is and has been $64.98 per month. [7]

7. That during the month of May, 1957, the Plaintiff furnished to her domestic water at the reasonable value of $1.50, for which she has paid nothing.

Dated April 21, 1958.

/s/ ROBERT L. FRASER,
Assistant United States Attorney.

[Endorsed]: Filed April 24, 1958. [8]

[Title of District Court and Cause.]

INTERROGATORIES TO BE ANSWERED BY DEFENDANT

Comes now the United States, Plaintiff in the above-entitled action, and under Rule 33, Rules of Civil Procedure, requests the Defendant to answer the following interrogatories:

1. Are you now living on the premises known as 1525 Hains Street, Richland, Washington?

2. If the answer to Question 1 is "Yes," does anyone else live there with you?

3. If the answer to Question 1 is "Yes," when did you begin living there?

4. If the answer to Question 1 is "Yes," was there any other person resident in those premises when you began living there?

5. If the answer to Question 4 is "Yes," what was his name? (If there was a family group, give only the name of the person who was husband and father.)

6. If the answer to Question 5 is the name of a person, what relationship, if any, did he bear to you?

7. Do you know whether the person, if any, named in your answer to Question 5 held a lease on the premises at 1525 Hains Street, Richland, Washington, when you started living there?

8. If the answer to Question 7 is "Yes," did that person hold such a lease or did he not?

9. If the person, if any, named in your answer to Question 5 is no longer living at 1525 Hains Street, Richland, Washington, and he now lives elsewhere, when did he move from 1525 Hains? [9]

10. (a) Have you ever received from anyone a document called a "Lease," purporting to give you the right to reside in the premises at 1525 Hains?

(b) Have you ever signed such a document?

11. (a) In your own behalf, have you ever paid rent for the premises at 1525 Hains Street?

(b) If so, what was the date of the last payment?

12. (a) Are you employed?

(b) If so, where and by whom?

13. Have you any children or dependents living with you?

14. What is your marital status?

Dated April 21, 1958.

/s/ ROBERT L. FRASER,
Assistant United States Attorney.

[Endorsed]: Filed April 24, 1958. [10]

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES

Comes now the Plaintiff in the above-entitled action, and by its officer and agent, Norman G. Fuller, answers as follows the interrogatories submitted by the Defendant:

1. At all times material to this action, the United States has been preparing to offer, or has been offering, to sell certain houses to persons entitled to residential occupancy of them. The United States has not offered to sell houses to people living therein without regard to whether they are entitled to residential occupancy. The first offerings of such houses were made on June 12, 1957.

2. The house occupied by the Defendant is known as a "Type H," and is the only Type H house that has not been offered for sale. A small number of other letter-designated types of houses which are of comparable quality, and which in that sense are of the same "kind" as the Type H, have also not been offered.

3. The Plaintiff has no knowledge sufficient for it to form a belief about whether Defendant has at all times or at any time been willing and able to purchase the house, but in Plaintiff's opinion she is not and never has been qualified or entitled to do so. However, Defendant has on numerous occasions expressed a desire to purchase.

4. Although her intention was not clear, Plaintiff believes that Defendant meant to offer to make all rental payments to the Plaintiff and, therefore, answers that she did so offer. Plaintiff refused to accept the offer and such payments.

5. The Defendant's last unequivocal offer to pay rent was made at Richland, Washington, on June 3, 1957, when the General Electric Company as Plaintiff's agent received from the Defendant through the United States mail a check in an amount equal to the reasonable monthly rental value of the house. However, as indicated in Answer number 4, Plaintiff believes that Defendant intended her offer [12] to make all rental payments to be a continuing one. The check mentioned in this Answer was returned to Defendant on June 11, 1957; the check was rejected and the offer was and is being rejected be-

cause Defendant was not and is not an acceptable tenant for the house.

6. Under the Atomic Energy Community Act of 1955 and under the Atomic Energy Commission's regulations, promulgated pursuant to that Act in accordance with the Administrative Procedures Act and published in Title 10 CFR, Part 130, Plaintiff has refused to offer to sell the house to Defendant. A copy of the regulations is attached.

7. Yes.

8. Plaintiff estimates that there have been not less than 100 such sales. It is impracticable to state in detail each of the circumstances under which each was made and to do so would be repetitive so far as is material. Single persons who purchased homes on the Hanford project have in every case been entitled at the time of sale, in accordance with a lease, to residential occupancy of the home each respectively purchased.

9. Yes.

10. Yes.

UNITED STATES OF AMERICA,

By /s/ NORMAN G. FULLER,
Director, Community Division, Hanford Operations Office, Atomic Energy Commission.

Duly verified.

[Endorsed]: Filed May 13, 1958. [13]

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS

Comes Now the defendant and in response to plaintiff's request for admissions admits and denies as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. No documents attached.
6. Admitted.
7. Admitted, although defendant states that she has always at all times been willing and able and has offered to pay the same.

POWELL & LONEY,

By /s/ DEAN LONEY,
Attorneys for Defendant.

Duly verified.

[Endorsed]: Filed May 21, 1958. [38]

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES

Comes now the defendant and by way of answer to the interrogatories submitted by the plaintiff states as follows:

1. Yes.

2. No.
3. Approximately October, 1951.
4. Yes.
5. William John Ozeroff.
6. Brother.
7. Yes.
8. Yes, he did.
9. Approximately December, 1956.
10. No.
11. (a) Yes.

(b) This defendant has continually offered to pay said rental. The last rental check the plaintiff accepted covered the period to April, 1957.

12. (a) Yes.

(b) Richland Laundry at Richland, Washington.

13. No.
14. Unmarried.

POWELL & LONEY,

By /s/ DEAN LONEY,
Attorneys for Defendant.

Duly verified.

[Endorsed]: Filed May 21, 1958. [39]

[Title of District Court and Cause.]

WRITTEN INTERROGATORIES TO BE ANSWERED BY PLAINTIFF

Comes now the defendant in the above-entitled action and under Rule 33, Rules of Civil Procedure,

requests the plaintiff to answer the following interrogatories:

1. That at all times material to this action the United States has been in the process of offering for sale homes to residents therein.

2. That the house occupied by the defendant has never been offered for sale although it is the only one of its kind not so offered.

3. That at all times material the defendant has been willing and able to purchase said house, and in fact has requested same on many occasions.

4. Did the defendant offer to make all rental payments to the plaintiff, and if so, did the plaintiff refuse to accept the same?

5. If the answer to the above question is yes, please state the time and place the last offer of payment was made, and the circumstances under which it was rejected.

6. Please state under what rules and regulations the plaintiff has failed to or refused to offer the house to the defendant for purchase, and attach copies of the regulations which plaintiff deems material thereto.

7. Have any other homes on the Hanford Project been sold to persons who were single at the time of sale?

8. Please state in detail each of the circumstances under which such sale was made.

9. Please state whether or not the plaintiff still refuses to sell the house to the defendant.

10. Please state whether or not the plaintiff is willing, ready and able to sell the house to other persons.

POWELL & LONEY,

By /s/ DEAN LONEY,
Attorneys for Defendant.

Duly verified.

[Endorsed]: Filed May 21, 1958. [41]

In the District Court of the United States for the Eastern District of Washington, Southern Division

Civil No. 1287

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARY OZEROFF,
Defendant.

Before: Hon. Sam M. Driver, Judge, without a jury.

RECORD OF PROCEEDINGS
AT THE TRIAL
June 11, 1958

Appearances:

For the Plaintiff:
WILLIAM B. BANTZ,
U. S. District Attorney;
ROBERT L. FRASER,
Assistant U. S. Attorney.

For the Defendant:
DEAN LONEY, Appearing for
POWELL & LONEY.

Be It Remembered:

That the above-entitled action came regularly on for trial and determination on June 11, 1958, before the Honorable Sam M. Driver, Judge, without a jury, in the District Court of the United States, for the Eastern District of Washington, Southern Division, Yakima, Washington, the plaintiff appearing by Robert L. Fraser, Assistant U. S. District Attorney; the defendant appearing by Dean Loney, for Powell & Loney; and all parties having announced that they were ready for trial;

Whereupon, the following proceedings were had, to wit:

The Court: In this case of the United States against Mary Ozeroff I took time yesterday afternoon to go through the file again and read all these requests for admissions [48] and requests for interrogatories, and it appears to me that the facts are pretty well laid out and agreed upon. It doesn't seem to me that there was any factual issue that would require a trial. It seems to me that the case could be disposed of on a Motion for Summary Judgment, and I would suggest that you consider arguing the case on that motion, first, at any rate. If either of you have an idea that there is a factual conflict here, I would like to know what it is so that we won't

waste any time on the Motion for Summary Judgment. If there isn't any dispute on the facts, why, it would serve no purpose to have testimony. You might just as well decide it on the motion.

Mr. Fraser: Your Honor, after examining the files and comparing the admissions against the complaint, the only facts which I find were admitted were the notice which the AEC gave Miss Ozeroff last year. There was no twenty-day notice.

The Court: I notice here in one of your requests for admissions you ask her to admit the genuineness of the motion attached hereto. I couldn't find it, anyway, if you haven't got your notice, I wonder if it could be agreed what the formal notice was?

Mr. Loney: Counsel has the notice. There is one thing about the notice that I might point out to your Honor, we don't deem the notice sufficient. If counsel is relying [49] on the Washington law relating to unlawful detainer, we don't deem the notice to be sufficient. I am sure that I can agree on it.

The Court: All right.

Mr. Fraser: I think the request showed, your Honor, that the notice was mailed to Miss Ozeroff and, also, that it was affixed to her dwelling house. We would have testimony, of course, that there was nobody there, that she is the only one who resides there, that there was nobody there when they went out there and, according to the statute, they can affix it to the house or leave it with a person of suitable age and discretion.

The Court: Well, if you can't reach an agreement on the motion, I think you had better put on

your proof here and then you can still take the agreed facts here as to the rest of the issues.

Mr. Loney: My client tells me that this is the same or a very similar notice.

Mr. Fraser: Well, I would have this marked.

The Court: As I understand it, your questioning of the sufficiency of the notice, it is based upon its contents rather than the method of service?

Mr. Loney: Yes, sir, I have no argument about that.

The Court: I think this should be identified in some way. [50]

Mr. Fraser: I have a witness here.

The Court: Well, I think it should be offered as an exhibit, it would be 1, I suppose?

The Clerk: Yes, Plaintiff's No. 1.

Mr. Fraser: Plaintiff's No. 1?

(Whereupon, said document was marked Plaintiff's Exhibit No. 1 for identification.)

Mr. Loney: I make no objection to it.

The Court: All right, it may be admitted, then, in evidence.

(Whereupon, said notice was admitted in evidence as Plaintiff's Exhibit No. 1.)

PLAINTIFF'S EXHIBIT No. 1

October 28, 1957.

Miss Mary Ozeroff,
1525 Hains,
Richland, Washington.

Dear Miss Ozeroff:

The General Electric Company, as agent for the Atomic Energy Commission, hereby notifies you to quit and vacate the premises known as 1525 Hains, Richland, Washington, at the expiration of November 20, 1957. If you have not quit the designated premises at the expiration of November 20, 1957, our principal, the Atomic Energy Commission, intends to take appropriate legal action to secure possession.

Very truly yours,

GENERAL ELECTRIC COMPANY,

By /s/ E. R. BARKER,
Supervisor, Residential Property.

Admitted in evidence June 11, 1958. [75]

Plaintiff's Case in Chief

SCOUT REED

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Fraser:

Q. Your name is Scout Reed and you reside at Richland, don't you, Mr. Reed?

A. I live in Richland, I am Housing Officer for AEC.

Q. What is that job?

A. Well, the AEC is divided into several divisions, one of which is a community division and the Housing Officer is one of the branches of that division. [51]

Q. In other words, it is your job to regulate the housing and put tenants in and take care of the others? A. That is true.

Q. Mr. Reed, with reference to 1525 Hains Street, I am assuming that you are familar with this controversy with Miss Ozeroff? A. I am.

Q. Does the United States Government or, rather, does the AEC manage the property at 1525 Hains Street? A. That is right, it does.

Q. And the United States has actual title to the property? A. That is true.

Q. Now, with reference to Miss Ozeroff, can you state of your own personal knowledge whether or not she has resided there since April, 1957?

A. Yes, she has.

(Testimony of Scout Reed.)

The Court: What is the address there?

Mr. Fraser: 1525 Hains, that is (spells) H-a-i-n-s.

The Court: That is a dwelling house?

A. That is a dwelling house unit.

The Court: And lot?

A. That is right.

The Court: As I gather here from going through the file, whatever the legal points or issues may be, the real [52] basis of this controversy, as I understand it, is not, do you pronounce that "Oh-zer-off"? Ozeroff, well, I was right the first time, is it Miss Ozeroff? The controversy isn't the failure of Miss Ozeroff to pay rent, so much as it is that she wants to buy this unit and the Government, or AEC or General Electric, or whoever has charge of the thing, will not sell it to her and she is perfectly willing to pay the rent on the basis that they are selling other units down there, but the Government takes the position that she isn't able to buy, isn't that the controversy?

Mr. Loney: It goes beyond that, not only a controversy whether she could purchase but whether or not she is eligible for a rental lease which she has never had.

The Court: I think it is conceded, or stated in the answer to the interrogatories, that she has admitted that she has no written lease, at any rate, and has never had a written lease, is that correct?

Mr. Loney: That is right, your Honor.

Q. (By Mr. Fraser): Now, since April, 1957, has she paid any rent?

A. No, because we have asked the General Electric Company not to collect it.

(Testimony of Scout Reed.)

Q. In other words, she has offered to pay rent but you would not accept it?

A. Checks have been returned. [53]

Q. Now, I want to make some inquiry into the purchase of the house, you are familiar with, is it, Public Law 220? A. 221.

Q. Public Law 221? Is Miss Ozeroff eligible under Public Law 221 to buy the house she is in?

Mr. Loney: Well, that is calling for a conclusion.

The Court: I think that is calling for a conclusion. I think the Court would have to decide, your regulations are set out in here, aren't they attached to your answer to the interrogatories? Part 130 of Priority Regulations of September 30 of 1956?

A. That is true.

The Court: I am taking this on a rather informal basis, it is before the Court here. Why do you think she isn't eligible? She was living with her brother who was eligible to rent?

A. He would have been eligible to have stayed.

The Court: He left and she stayed on in the unit?

A. And he was told at the time that he was served notice that if he came back in a given length of time, he would be eligible to stay in the house.

The Court: Do they have to work for General Electric?

A. No, they have to be project-connected, which she is. She works at the Richland Laundry.

The Court: Is that a G. E. laundry? [54]

A. No, that is run by Harvey Stoll, who came over from Walla Walla. We could not transfer the lease on that particular house, we transfer only to

(Testimony of Scout Reed.)

wives whose husbands have died or to separated wives who work, in those two cases we transfer leases to relatives, but those are the only two cases.

The Court: Have you transferred it to anybody else?

A. No, only under those two conditions.

The Court: I don't want to be sacrilegious, but I was wondering if you couldn't get a special dispensation?

A. Well, of course, that is what we have been requested to do for some months.

Q. (By Mr. Fraser): You have offered her other houses, have you not, that is, specific houses?

A. Specific houses and type.

Q. You are familar with Public Law 221, aren't you? A. Yes.

Q. Can you state the order of priority for that particular house for a purchaser in order to purchase?

Mr. Loney: Excuse me, if your Honor please, I think that the law, perhaps, speaks for itself. I have it here if the Court would care to examine it. I think you are talking about the Atomic Energy Commission Act of 1955, is that it?

A. Public Law 221.

Mr. Loney: I think, perhaps, this is [55] somewhat objectionable for this man to describe it.

The Court: I think it would only be regarded as calling it to the Court's attention. I would not be bound by his testimony. If you have the Act there, I would like to see it. Will you agree that this is it?

Mr. Fraser: I haven't had a chance to see it. The only one I have seen is the one that they submitted to me. I do feel, your Honor, that this is an

(Testimony of Scout Reed.)

action in unlawful detainer. There has been no cross complaint on their part in the matter, and I feel that we might be getting beyond the realm of the action. I would, certainly, want to give Miss Ozeroff and Mr. Loney opportunity to present their side of if, no matter what. This is no action to tell the Government to sell it, it is admitted that she hasn't a lease, and I think we might be getting beyond the realm of the action, itself.

The Court: Of course, I am not just too sure now whether we are proceeding with the full-dress trial, or submitting material in supplement of the material filed here in support of the Motion for Summary Judgment. Of course, if you are moving for summary judgment any reason why it couldn't be granted, of course, clearly appears from the factual settlement in the case, of course, would have to be taken into consideration if we proceed with the full trial. I don't know, I don't think it could be said that you have been [56] misled in any way. I think it has been apparent to the Government for some time what she wants, isn't it, she wants to buy the place?

Mr. Fraser: Your Honor, let's put it this way, it was apparent to me when I received the interrogatories which Mr. Loney submitted here.

The Court: You know, I can't remember whether we had a pre-trial conference.

Mr. Fraser: No, sir, we didn't. Mr. Loney was sick at the time.

The Court: If we had had a pre-trial conference, these issues would have been set out.

Mr. Loney: Yes, your Honor, we could adjourn this matter to a pre-trial conference and, then, go

(Testimony of Scout Reed.)

into the trial. I don't see any material issues of fact about which we cannot agree.

The Court: Well, that was my thought and, of course, on Motion for Summary Judgment.

Mr. Fraser: Your Honor, I am planning on pursuing that Motion for Summary Judgment.

The Court: Yes, the thought that came to me here, is what would be the result if I deny the motion, would that be finally determinative of the action? By agreeing, it would be, of course, but if I denied it, then, what would we have to go to trial, or would the Government take that [57] decision as final? Of course, I think what you might do, Mr. Loney, I suggest here, I see no reason why you couldn't move for summary judgment on behalf of your client if you think that there is no factual controversy, why not have the motion by each party?

Mr. Loney: That is right, I was intending to do that, sir, as soon as the factual matters were in evidence sufficiently.

The Court: I don't think you need to file a formal motion here, you can make it orally in open court. Let's, first, get all the testimony in, and then we can proceed with that.

Mr. Fraser: I believe that is all with this witness, your Honor.

The Court: All right, any cross-examination, Mr. Loney?

(Testimony of Scout Reed.)

Cross-Examination

By Mr. Loney:

Q. In the matter of this disposal, Mr. Reed, the disposal under the Public Law that you mentioned, either the Act nor the regulations which you have set out in the interrogatories differentiate between this house and some other house on the project?

A. Yes, I believe they do, I think an occupant is [58] quite clear.

Q. I think you misunderstood my question, as you stated, Miss Ozeroff is a project-connected person within the meaning of the Act, is she not?

A. Well, we are not talking about Public Law 221, Public Law 221 has only to do with sale. The housing, the leasing, is under the Atomic Energy Act of 1955. When we are talking about Public Law 221, we are only talking about purchase. We are not talking about who is eligible for a lease under Public Law 221.

Q. Well, even under the Purchase-Disposal Act she is a project-connected person, isn't she?

A. That is true, that is true.

Q. And neither the law nor the regulations promulgated under the law differentiate between the house at 1525 Hains and the house, for example, on Jadmon, both of them being single dwellings, there is no differentiation made, is there?

A. There is, it is true that a project-connected person who is eligible to buy one house would normally be eligible to buy another one, that is true.

(Testimony of Scout Reed.)

Q. And you mentioned earlier that other housing had been offered Miss Ozeroff and this other housing was in the form of pre-fabs, and she was offered leases on this other housing? [59]

A. Pre-fabs, or a duplex.

Q. Now, Miss Ozeroff was eligible for a lease from the General Electric Company, acting for General Electric Company, is that not right?

A. Yes, on the master list.

Q. And the reason you couldn't give her another house for this one is just because of the difference in the house not spelled out in the Act?

The Court: I don't get that.

Q. (By Mr. Loney): The pre-fab house they would lease to her and this house they would lease to her?

A. This is because of housing eligibility regulations, which you are quite right, is not part of any statute.

Q. The houses that were offered to her were offered to her with an opportunity to buy rather than an opportunity to rent?

A. If she had moved at the time we first encouraged her, she would have been able to purchase.

Q. Weren't they duplexes in which there would be a senior tenant?

A. Not necessarily, there could have been but, in all probability, she would have had a chance to buy either a duplex and, certainly, a pre-fab.

Mr. Loney: No further questions, your Honor.

The Court: Is that all from this witness? [60]

Mr. Fraser: That is all.

(Witness excused.)

Mr. Fraser: I assume, Mr. Loney, you admit this was served properly and your only objection goes to the contents of it?

The Court: That is what I understood him to say.

Mr. Fraser: Well, then, I can't see what other witnesses we would have, your Honor. We would rest on summary judgment.

The Court: Do you wish to put on anything?

Mr. Loney: I might ask counsel if he will stipulate to certain facts.

The Court: All right.

Mr. Loney: Would you stipulate that if Miss Ozeroff were called to the stand she would testify that she was ready, willing and able to purchase this house, should it be offered for sale?

Mr. Fraser: I think I would agree with that, I wouldn't have any controversy with it, anyway.

Mr. Loney: I, really, can't think of anything else material.

The Court: I see, and you have nothing further?

Mr. Fraser: No, your Honor. The requests plus that covers everything, and the exhibit.

The Court: Yes. [61]

(Plaintiff rests.)

The Court: Well, as I understand it, you are moving for summary judgment in behalf of the defendant?

Mr. Loney: Yes, your Honor.

The Court: I think I will let you take a short recess here and let you organize your argument. We should finish this by noon, anyway, can't we?

Mr. Loney: Yes, your Honor.

The Court: I will take a short recess for ten minutes.

(Whereupon, a recess was taken for a period of ten minutes.)

(Defendant rests.)

(Closing argument of counsel.)

The Court: Well, I will assume that the pleadings have been amended to conform to the proof so that that remedy would be available for you, if justified. I think that [62] the case should be settled now. In a case of this character, certainly, there should not any additional time nor expense be expended on it. Mr. Fraser?

(Closing argument of plaintiff.)

Oral Opinion of the Court

The Court: I think I have indicated here in my remarks on the bench that I have genuine sympathy for Miss Ozeroff. I know what a home means to people from my own experience and observation, and I wish that there was some way that I could dispose of this case in her favor. Unfortunately, I just don't believe there is.

In the first place, I think I should give some con-

sideration to the administrative interpretation of these regulations, the interpretation placed upon them by the people who have the responsibility of administering them, and I have no reason to believe that they are not acting objectively and impersonally and what they think is in accordance with the regulations here. Aside from that, I think that the regulations, which have the force of a statute, do not give Miss Ozeroff here a priority and, if that is the case, of course, why, there is only one thing that she can do and that is to pay this rental and try to make the best deal she can on some other house.

So far as the defect in the notice is concerned, I think that there is substantial compliance here and I feel [63] that since I am making the decision that I am on the merits here, it wouldn't serve any useful purpose, certainly, for Miss Ozeroff to require the Government to serve another notice on her and come back here in a month or two months with another trial, and I believe, from a practical standpoint, it is better for all concerned to take the position that there has been substantial compliance here and have judgment for the plaintiff. Of course, you are not entitled to an attorney's fee here and the costs are not considerable, I presume?

Mr. Fraser: No, sir, the only thing we will ask for is the rent which can be mathematically computed from May 1st to date, plus our costs, and that will be all.

The Court: I see.

Mr. Loney: We have offered to pay the rent, if

your Honor please, and have the check made payable here.

The Court: I think in view of the fact that Miss Ozeroff has agreed to pay the rental here, there shouldn't be any interest paid. I think if she just pays the principal of the rental, that will be sufficent.

Mr. Fraser: That is perfectly all right with us, your Honor.

The Court: The court will adjourn, then, until tomorrow morning at ten o'clock.

(Whereupon, court was adjourned until ten o'clock a.m. on June 12, 1958.)

[Endorsed]: Filed October 2, 1958. [64]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on for trial before the above-entitled Court on the 11th day of June, 1958, and the plaintiff being represented by William B. Bantz, United States Attorney for the Eastern District of Washington, and Robert L. Fraser, Assistant United States Attorney for said District, and the defendant being represented by Dean Loney, attorney of record; and the evidence having been taken, the Court from the pleadings and evidence introduced makes the following:

Findings of Fact

I.

That the above-named plaintiff, at all times material to this action, through the Atomic Energy Commission, its agency, was the owner and manager of that certain dwelling unit located at 1525 Hains Street, Richland, Washington, under the authority of the Atomic Energy Commission Act of 1954, Public Law 703, 83d Congress, Chapter 1073, 2d Session, and specifically Subsections 161(e) and 161(g) thereof.

II.

That since the first day of May, 1957, the defendant has held and resided in that certain dwelling and premises, owned by the plaintiff, known as 1525 Hains Street, Richland, Washington, without a lease and without plaintiff's permission.

II.

That since the first day of May, 1957, the reasonable monthly rental value of said dwelling, premises and appliances therein, is, [66] and has been, $64.98, no part of which sum has been paid by the defendant, although said defendant has been ready, willing and able at all times material to this action to pay said rental.

IV.

That during the month of May, 1957, domestic water was furnished the defendant by the plaintiff at 1525 Hains Street, Richland, Washington, the reasonable rate being $1.50, of which sum the de-

fendant has paid no part, although said defendant has been ready, willing and able at all times material to this action to pay said assessment.

V.

That on the 28th day of October, 1957, the plaintiff caused to be served upon the defendant a notice requiring said defendant to vacate the said premises at the expiration of the 20th day of November, 1957, that the said notice was given in compliance with the unlawful detainer statute of the State of Washington, to wit: R.C.W. 59.12.040 in that the notice referred to was served upon the defendant at 1525 Hains Street, Richland, Washington, by affixing a copy of said notice in a conspicuous place, to wit: on the door of said dwelling and by sending through the mail with proper postage prepaid, a copy addressed to the defendant at 1525 Hains Street, Richland, Washington; that neither the defendant nor any other person was found at the said premises at the time of said service.

VI.

That despite the request and notice to vacate said premises as hereinbefore set forth, defendant has failed and refused to vacate said premises as demanded; that defendant now owes to plaintiff rent from May 1, 1957, until such time as said premises are vacated, at the rate of $64.98 per month and $1.50 for water furnished in the month of May, 1957.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law: [67]

I.

This Court has jurisdiction over the subject matter and the parties to the action.

II.

Plaintiff at all times material to this action was and is the owner of that certain dwelling unit located at 1525 Hains Street, Richland, Washington.

III.

The notice to vacate given by the plaintiff to the defendant as referred to in Paragraph V of the Findings of Fact herein was proper notice and meets the requirement of the unlawful detainer statutes of the State of Washington, i.e., R.C.W. 59.12.040.

IV.

That the defendant is guilty of unlawful detainer of said premises; that the plaintiff is entitled to the issuance of a Writ of Restitution ousting the defendant from the possession of said premises and restoring possession thereof to the plaintiff.

V.

That the plaintiff should have judgment against the defendant for rent due from May 1, 1957, to the date of vacating said premises at the rate of $64.98 per month, plus $1.50 for domestic water furnished for the month of May, 1957, plus interest

at 6% from the date of judgment, plus costs and disbursements herein.

Done this 25th day of June, 1958.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ WILLIAM B. BANTZ,
United States Attorney;

/s/ ROBERT L. FRASER,
Assistant United States Attorney.

[Endorsed]: Filed June 25, 1958. [68]

United States District Court for the Eastern District of Washington, Southern Division

Civil No. 1287

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARY OZEROFF,
Defendant.

JUDGMENT

This matter having come on for trial before the above-entitled Court on June 11, 1958, and the plain-

tiff being represented by William B. Bantz, United States Attorney for the Eastern District of Washington, and Robert L. Fraser, Assistant United States Attorney for said District, and the defendant being represented by Dean Loney, attorney of record, and the Court having considered evidence produced, arguments of counsel, and having made its findings of fact and conclusions of law, it is by the Court:

Ordered, Adjudged and Decreed that the plaintiff is awarded judgment against the defendant in the principal sum of $900.39 of which sum $898.89 represents rent due from May 1, 1957, to the date of judgment, and $1.50 being an amount due for domestic water furnished the defendant by the plaintiff for the month of May, 1957.

It Is Further Ordered that a Writ of Restitution shall be issued by the Clerk of the above-entitled Court in the manner provided by law, restoring to the plaintiff that certain dwelling unit at 1525 Hains Street, Richland, Washington, and

It Is Also Further Ordered that the plaintiff recover its costs as taxed by the Clerk herein in the sum of $54.10, and further, that this judgment shall bear interest at the rate of 6% per annum from this date until paid.

Dated this 25th day of June, 1958.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ ROBERT L. FRASER,
Assistant United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 25, 1958. [70]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant, Mary Ozeroff, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain judgment entered in the above-entitled case in favor of the United States of America, Plaintiff, on the 25th day of June, 1958.

POWELL & LONEY,

By /s/ DEAN W. LONEY,
Attorneys for Defendant,
Mary Ozeroff.

[Endorsed]: Filed August 12, 1958. [77]

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME FOR DOCKETING APPEAL

Comes Now the defendant, by and through her attorneys of record, Powell & Loney by Dean W. Loney and respectfully moves the above-entitled Court for an order extending the time for docketing the appeal in this action for a period of fifty (50) days from and after September 19, 1958.

This Motion is made for the reason that illness in the immediate family of the defendant prevents the presence of the defendant and the necessary steps being taken in the preparation of the appeal at this time.

POWELL & LONEY,

By /s/ DEAN W. LONEY.

[Endorsed]: Filed September 19, 1958. [78]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING APPEAL

This Matter having come on regularly in its order to be heard upon the request of the defendant for an additional extension of time within which to docket the appeal in the above-entitled cause, and the Court being duly and fully advised in the premises, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that the time for docketing the appeal in the above-entitled cause is hereby extended for a period of fifty (50) days in accordance with the rules of court and the laws of the United States of America.

Done by the Court this 19th day of September, 1958.

s/ WILLIAM J. LINDBERG,
Judge.

[Endorsed]: Filed September 19, 1958. [79]

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Dorothy Moulton, Acting Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above cause, as called for in Appellant's Designation filed on November 28, 1958,

Complaint.
Appearance of Powell & Loney, attorneys for deft.
Answer.
Defendant's Demand for Jury.
Request for Admissions.

Interrogatories to be answered by Defendant.

Certificate of Service by mail of Request and Interrogatories.

Plaintiff's Answers to Interrogatories.

Defendant's Answer to Request for Admissions.

Defendant's Answer to Interrogatories.

Defendant's Interrogatories to Plaintiff.

Plaintiff's Motion for Summary Judgment with affidavit of service.

Court Reporter's transcript of testimony at trial.

Findings of Fact and Conclusions of Law.

Bill of Costs.

Judgment.

Writ of Restitution and Marshal's return.

Plaintiff's Exhibit No. 1.

Notice of Appeal.

Motion for Order extending time to docket appeal.

Order Extending time for docketing appeal.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said district this 28th day of November, 1958.

DORTHY MOULTON,
Acting Clerk, United States District Court, Eastern District of Washington.

[Seal] By /s/ THOMAS GRANGER,
Deputy.

[Endorsed]: No. 16271. United States Court of Appeals for the Ninth Circuit. Mary Ozeroff, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal From the United States District Court for the Eastern District of Washington, Southern Division.

Filed: December 1, 1958.

Docketed: December 8, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 16271

MARY OZEROFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes Now the appellant and submits this her Statement of Points:

1. The Court erred in holding that the plaintiff-appellee was entitled to a judgment evicting defendant—appellant from the real property and premises involved in this case.

2. The Court erred in finding that defendant-appellant could not purchase the real property and home from the plaintiff-appellee.

3. The Court erred in holding the defendant-appellant did not have a priority to purchase the home in which she had been residing in Richland, Washington.

4. The Court erred in his interpretation and application of the statutes of the United States applicable to this case.

Dated this 22nd day of December, 1958.

POWELL & LONEY,

By /s/ JOHN A. WESTLAND,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 29, 1958.

No. 16271

UNITED STATES COURT OF APPEALS For The Ninth Circuit

MARY OZEROFF

Appellant,

vs.

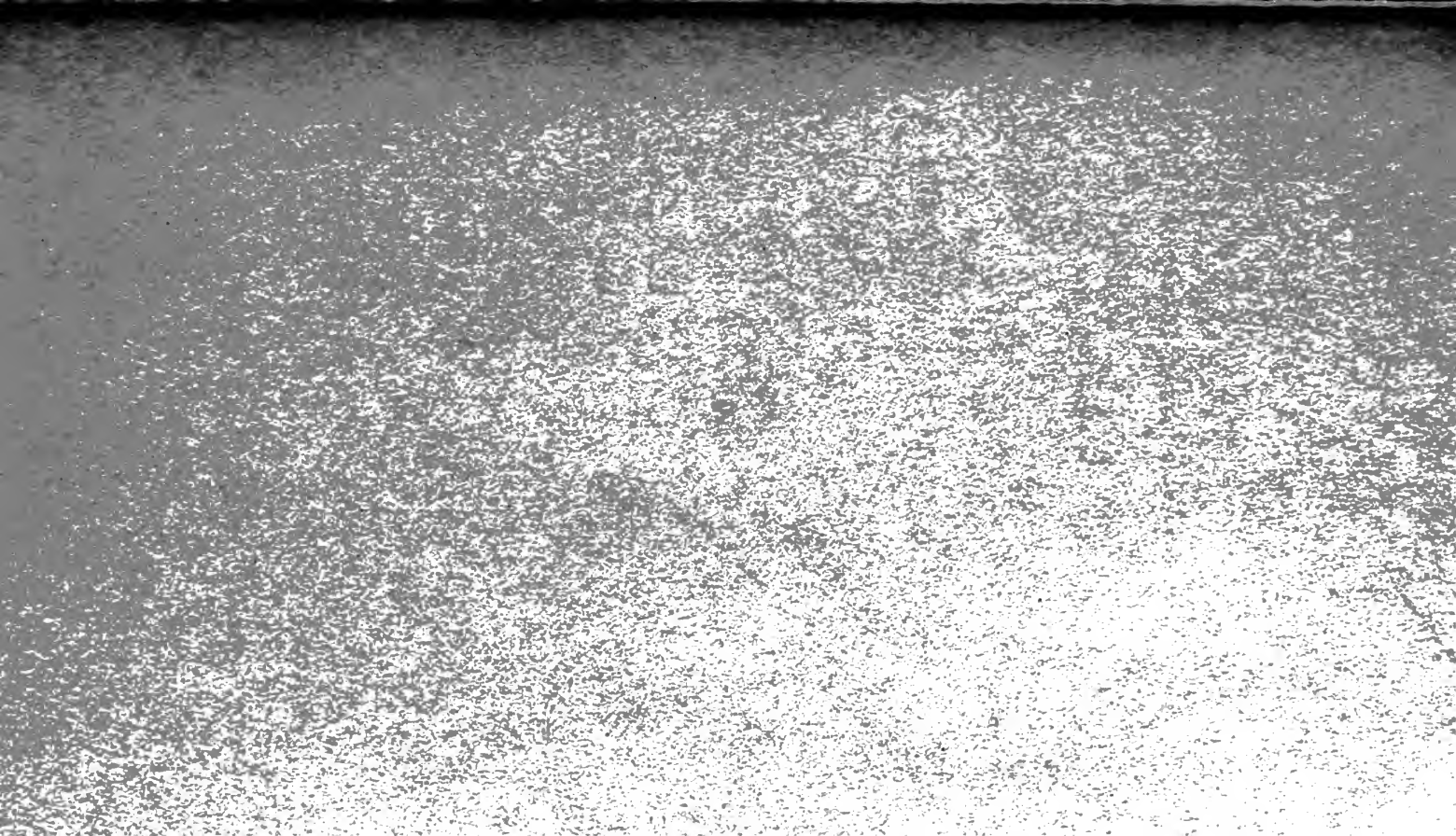
UNITED STATES OF AMERICA

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Dean W. Loney
of POWELL & LONEY
Attorneys for Appellant
P. O. Box 125
Kennewick, Washington



SUBJECT INDEX

TABLE OF CASES AND STATUTES

No. 16271

UNITED STATES COURT OF APPEALS For The Ninth Circuit

MARY OZEROFF

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Dean W. Loney
of POWELL & LONEY
Attorneys for Appellant
P. O. Box 125
Kennewick, Washington

A. STATEMENT OF PLEADINGS.

Appellee, United States of America, commenced this action in unlawful detainer against Appellant to recover possession of a private single family dwelling located in Richland, Washington (R 3-6). The action was commenced under authority of Title 28, U.S.C. Section 1345.

Appellant resisted the relief requested because of a failure to comply with the laws of the State of Washington (Revised Code of Washington, 59. 04 020) and the Disposal of Atomic Energy Communities, Act of 1955, Title 42 U.S.C. 2301, et seq.

B. STATEMENT OF CASE.

Appellant, Mary Ozeroff, moved into the single family dwelling house at 1525 Hains Street in Richland, Washington on or about October, 1951 (R. 15). She resided there with her brother, William John Ozeroff, until he moved in December, 1956 (R. 15).

Appellant then remained in the house on a month to month basis, paying the rent each month until May 1, 1957, at which time her tendered monthly rental was refused (R.12,24).

On October 28, Appellee posted a notice on the premises and mailed the notice as provided by the laws of the State of Washington, R.C.W. 59.12.040 (R. 8, 14) (Exhibit 1, R. 21).

In June of 1957, the Atomic Energy Commission commenced offering these Richland homes for sale (R. 11). The house occupied by Appellant is the only house of its type not offered for sale by the A.E.C. (R. 12).

At all material times, Appellant was ready, willing and able to purchase the house which had been her home over the past several years (R. 30). Appellant attempted this purchase on many occasions (R. 25).

By Appellee's own admissions, Appellant was eli-

gible for the home. Scout Reed, Housing Officer for the Atomic Energy Commission (R. 22), testified:

"The Court: Do they have to work for General Electric?

Answer: No, they have to be project-connected, which she is . . ." (R. 24).

Q. Well, even under the Purchase-Disposal Act she is a project-connected person, isn't she?

A. That is true, that is true.

Q. And neither the law nor the regulations promulgated under the law differentiates between the house at 1525 Hains and the house, for example, on Jadwin, both of them being single dwellings, there is no differentiation made, is there?

A. There is, it is true that a project-connected person who is eligible to buy one house would normally be eligible to buy another one, that is true . . ." (R. 28).

Q. Now, Miss Ozeroff was eligible for a lease from the General Electric Company, acting for [A.E.C.] (sic) General Electric Company, is that not right?

A. Yes, on the master list . . . ." (R. 29).

Appellee is ready and willing to sell the house but wants to sell to someone else. [Plaintiff's Answer No. 10 (R. 13) to defendant's interrogatory No. 10 (R. 17)]

C. SPECIFICATION OF ERRORS.

I. The notice to terminate tenancy was insufficient because it attempted to terminate the tenancy before the end of the rent-paying period.

II. The unlawful detainer action was improperly brought since the proper notice was not given and therefore

III. Appellant was entitled to purchase the home and therefore Appellee had no right to attempt an eviction.

D. ARGUMENT.

I. THE NOTICE WAS INSUFFICIENT.

Plaintiff's Exhibit I is the notice sent by Appellee attempting to terminate the tenancy (R. 21).

Appellee was not entitled to a judgment awarding a Writ of Restitution.

The premises were rented for an indefinite time with monthly rental reserved (R. 15, 9). The rental period was from the first of each month to the first of the next month.

The laws of the State of Washington provide as follows:

R.C.W. 59.04.020 Tenancy from month to month - Termination.

> When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, and shall be terminated by written notice of thirty days or more, preceding the end of any of said months or periods, given by either party to the other. [Code 1881 § 2054; 1867 p 101 § 2; RRS § 10619. Prior: 1866 p 78 § 1.]

R.C.W. 59.12.030 Unlawful detainer defined.

> A tenant of real property for a term less than life is guilty of unlawful detainer either:
>
> (2) When he, having leased property for an indefinite time with monthly or other

> periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice (in manner in RCW 59.12.040 provided) requiring him to quit the premises at the expiration of such month or period;

Compliance with these statutes requires that the notice terminate the tenancy at the end of the rent-paying period and be served at least 20 or, in some cases, 30 days before the end of this period.

The notice used in this case attempts to terminate the tenancy at least 10 days before the end of the month (Ex. I, R. 21).

The general rule as found in 86 A.L.R. 1349 is:

> "It may be stated generally that the notice given in order to terminate a tenancy must require that the tenancy terminate at the end of one of the recurring periods of the holding."

Implicit recognition of this rule by the Washington Court is found in Harris v. Halverson, 23

Wash. 779, 63 Pac. 549; Lowman v. Russell, 133 Wash. 10, 233 Pac. 9; and Worthington v. Moreland Motor Truck Co., 140 Wash. 528, 250 Pac. 30.

II. APPELLANT NOT GUILTY OF UNLAWFUL DETAINER.

The notice could only have required that the tenancy terminate on or after November 30, 1957. This was not the case, and the Appellee's action must therefore be dismissed. Appellant was not guilty of unlawful detainer since the notice did not require her to "quit the premises at the expiration of such month . . ." R.C.W. 59.12.030 (2).

III. APPELLANT WAS ENTITLED TO PURCHASE THE HOUSE.

In August, 1955, Congress enacted the DISPOSAL OF ATOMIC ENERGY COMMUNITIES ACT, 42 U.S.C. § 2301 et seq.

One of the stated policies was the desire to:

> (c) Provide for the orderly sale to private purchasers of property within those communities with a minimum of dislocation.
>
> 42 U.S.C. 2301 (c).

Appellant is the occupant, and the only occupant, of the house at 1525 Hains Street (R. 12). She is a "project-connected person" within the meaning of the Act (R. 24, 28, 29).

This is further borne out by 42 U.S.C. § 2346, entitled Occupancy by Existing Tenants. It provides in part:

> "Upon application by any occupant of a single . . . . house made within the period of first priority when such house is first offered for sale under this chapter, the Commission *shall* execute a lease to such occupant . . . ." (Emphasis supplied).

It stretches the meaning of the unlawful detainer statutes to find a tenant guilty in the face of these rights conferred by Congress. In answering the interrogatories, Appellee admits that in excess of 100 sales have been made to persons like Appellant (R. 13) and this house will be sold to anyone but Appellant (Interrogatory 10, R. 17, Answer 10, R. 13).

Congress has seen fit to tell the A.E.C.:

"The priorities *shall* . . .

> (c) give the occupant of a Government-owned single family house . . . . at least ninety days in which to

exercise the first right of priority; . . ."
42 U.S.C. 2332 (c)

The Government does not deny Appellant's rights to be an occupant of this type housing. But by these means the Government seeks to avoid its plain obligation to sell the home to Appellant by first evicting her and then denying her priority by claiming she is no longer an occupant.

IV. CONCLUSION.

The unlawful detainer action should be dismissed. The notice to vacate did not comply with the statutory mandate. After acceptance of Appellant as a tenant and occupant the Commission cannot defeat her priority rights by this method. With the Act of Congress granting Appellant right to lease or purchase, it cannot be urged that she is guilty of unlawful detainer.

Respectfully submitted,
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APPENDIX

No. 16271

In the United States Court of Appeals for the Ninth Circuit

MARY OZEROFF, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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INDEX

CITATIONS

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BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court's oral opinion (R. 31–33) is not reported. The findings of fact and conclusions of law appear in the record at pages 33–37.

JURISDICTION

This is an appeal from a judgment of the district court entered June 25, 1958 (R. 37–38). Notice of appeal was filed August 12, 1958 (R. 39). The jurisdiction of the district court over this suit by the United States rested on 28 U.S.C. sec. 1345. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether appellant, who was admittedly in possession of property owned by the United States without

a lease, had sufficient and proper notice that the United States was terminating her possession under the unlawful detainer statutes of the State of Washington.

STATUTES INVOLVED

Pertinent sections of the Revised Code of Washington provide as follows:

> 59.04.050 *Tenancy by sufferance—Termination.* Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he occupied the premises, and shall forthwith on demand surrender his said possession to the owner or person who had the right of possession before said entry, and all his right to possession of said premises shall terminate immediately upon said demand.
>
> 59.12.030 *Unlawful detainer defined.* A tenant of real property for a term less than life is guilty of unlawful detainer either:
>
> * * * * *
>
> (6) A person who, without the permission of the owner and without color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice, in writing, is served upon him in the manner provided in RCW 59.12.040.
>
> 59.12.040 *Service of notice—Proof of service.* Any notice provided for in this chapter shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he be absent from the premises unlawfully

held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his place of residence; or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his place of residence is not known, or if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated. * * *

STATEMENT

The uncontested facts of this case, as shown by the findings and pleadings, may be summarized as follows:

The United States, through its agent, the Atomic Energy Commission, has been the owner and manager of the premises known as 1525 Hains Street, Richland, Washington, during all times relevant to this action in connection with the Hanford Atomic Energy Project (R. 3, 34). Since May 1, 1957, appellant has resided on those premises without a lease and without the permission of the United States (R. 3–4, 34). Appellant has never held a lease of the premises (R. 8, 14). Prior to May 1, 1957, appellant had lived on the premises with her brother who held a lease from the United States in his own name (R. 10, 15). Since her brother's departure and the termination of his lease, appellant has remained in possession of the

house on the premises and refused to surrender possession. Although she offered to pay rent on the premises, the Government refused to accept her tender of rentals because under applicable statutes and regulations appellant was not entitled to rent the premises (R. 24–25). The record shows that appellant was claiming a priority right to purchase this property but that Government officials refused her offer because of her lack of qualifications under the statutes and regulations.

On October 28, 1957, the United States in compliance with the unlawful detainer statutes of the State of Washington gave notice in writing to appellant that she would be required to vacate the premises by November 20, 1957 (R. 21). Since appellant was not found at the premises at the time of service, the notice was served by affixing a copy of the notice on the door of the dwelling on the premises and by mailing a copy personally addressed to appellant at that location (R. 4–5, 35). Appellant still refused to vacate and the United States, on December 4, 1957, filed this action to have appellant adjudged guilty of unlawful detainer of the premises, to obtain a writ of restitution ousting her from the premises and restoring possession to the United States, and to obtain judgment for the fair rental of the premises for the period of appellant's unlawful possession (R. 3–6). After answer to interrogations and requests for admissions had been filed (R. 8–20), trial was held on June 11, 1958, and on June 25, 1958, the district court granted the full relief requested by the United States (R. 37–38). The court expressed sympathy for appellant but

ruled that she did not have a priority right and that there had been substantial compliance with notice requirements (R. 31–32). This appeal followed (R. 39).

ARGUMENT

I

THE NOTICE TO VACATE THE PREMISES WAS SUFFICIENT AND PROPER UNDER THE STATUTES OF WASHINGTON IN LIGHT OF THE CIRCUMSTANCES OF THIS CASE

At the outset, it should be emphasized that appellant's written admissions reveal that she has never held a lease on the instant premises (R. 8, 14). Yet her objection to the notice given by the United States relates solely to the contention that, as a month-to-month tenant, she must have notice to vacate at least 20 days before the end of the rent-paying period. Her argument proceeds to assert that even though notice here was served October 28 and the vacating date set at November 20, such notice of 23 days was not sufficient because she could not be forced to vacate until the end of the month, i.e., November 30.

The obvious answer to this contention is that appellant was never a month-to-month tenant of this property. Since she was in possession of the premises without a lease and without permission of the owner (R. 34), her "tenancy" is the classic example of a tenancy by sufferance, and under RCW 59.04.050, *supra,* p. 2, she was entitled to no notice in advance. Rather, a tenant by sufferance must surrender possession on demand, as well as pay reasonable rent for

the actual time the premises were unlawfully occupied. At the most, appellant was entitled only to three days' notice under subsection (6) of RCW 59.12.030, *supra,* p. 2, which describes a person in unlawful detainer as one who, "without permission of the owner and without color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice in writing is served upon him in the manner provided in RCW 59.12.040." Since appellant received well over three days' notice in writing and since she admits that she properly received that notice under the provisions of RCW 59.12.040 (R. 8, 14, 20), there remains no substance to her contention that the notice served was insufficient.

Although we believe that the above argument is dispositive of this appeal, it should be noted that even if appellant had been a month-to-month tenant, she could not successfully attack the notice given to her in this case. The purpose of a notice to vacate is to inform the tenant in possession of the owner's intent to oust him (or, assuming a lease, to terminate the lease). The mere fact that appellant—if a month-to-month tenant—legally could not have been evicted until the end of November, rather than November 20 as stated in the notice, could not possibly have prejudiced her rights in any manner. The notice was clear and unequivocal, and adequately described the premises. In *Worthington* v. *Moreland Motor Truck Co.,* 140 Wash. 528, 250 Pac. 30 (1926), a case involving the sufficiency of notice under a statute requiring 30 days' notice, notice was given November 3. The

court held that, while the lease would not terminate on November 30, it would terminate on December 31 without further notice. Although that case involved notice given by a tenant, it does illustrate the view of the Washington courts that a reasonable compliance with the notice statutes is sufficient. In *Provident Mutual Life Ins. Co.* v. *Thrower,* 155 Wash. 613, 285 Pac. 654 (1930), in speaking of a notice to vacate, the court at p. 617 stated that "As to the form and contents of the notice or demand, a substantial compliance with the statute is sufficient." To the same effect are *Erz* v. *Reese,* 157 Wash. 32, 288 Pac. 255 (1930), and *Davis* v. *Jones,* 15 Wash. 2d 572, 131 P. 2d 430 (1942). Cf. 31 Wash. L. Rev. 51 (1956). In the instant case appellant had knowledge of the eviction on October 28, and even if she could not have been forced to move until the end of a monthly rental period, she would have had to vacate on November 30, 1957. This action by the United States was instituted on December 4, 1957. Plainly, even under appellant's misconception that she had the status of a month-to-month tenant, the notice in this case was sufficient under the statutes and decisions of the State of Washington.

II

APPELLANT'S ALLEGED PRIORITY RIGHT TO PURCHASE CONSTITUTES NO DEFENSE TO THIS ACTION

A. *There was no issue properly before the district court relating to appellant's right to purchase the house on the premises:*—Appellant attempts (Br. 7–9) to inject an issue into this appeal that was not before

the district court by any pleading whatsoever and which is totally irrelevant to the unlawful detainer action brought by the United States. The findings of fact, conclusions of law and judgment of the district court neither mention nor purport to decide the issue of whether appellant was entitled to purchase the house on the premises here involved. Under such circumstances, this irrelevant issue cannot now be forced into the case. *Century Furniture Co.* v. *Bernhard's Inc.,* 82 F. 2d 706 (C.A. 9, 1936); *DeJohn* v. *Alaska Matanuska Coal Co.,* 41 F. 2d 612 (C.A. 9, 1930).

It is equally clear that the district court could not have entertained this contention—whether formally raised by a counterclaim or developed in the hazy fashion of this case—since a suit by the United States on one issue (here, unlawful detainer) does not allow the defendant to inject into the action collateral issues on which the United States has not consented to suit (here, the right of appellant to purchase the house on the premises). This is so because "[t]he objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it." *United States* v. *Shaw,* 309 U.S. 495, 503 (1940); *Nassau Smelting Works* v. *United States,* 266 U.S. 101, 106 (1924); *Illinois Central R.R. Co.* v. *Public Utilities Comm.,* 245 U.S. 493, 504–505 (1918). See also *United States* v. *U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 512–514 (1940); *United States* v. *Fin,* 239 F. 2d 679 (C.A. 9,

1956); *Waylyn Corp.* v. *United States,* 231 F. 2d 544, 547 (C.A. 1, 1956); *United States* v. *Hosteen Tse-Kesi,* 191 F. 2d 518 (C.A. 10, 1951). Moreover, the only jurisdiction of affirmative claims against the United States vested in the court below is for money judgments under the Tucker Act or Tort Claims Act. Cf. *New Haven Public Schools* v. *General Services Administration,* 214 F. 2d 592 (C.A. 7, 1954). In *Blanc* v. *United States,* 244 F. 2d 708 (C.A. 2, 1957), the court said (p. 709): "The consent of the United States to be sued under the Tucker Act is limited to suits for the recovery of a money judgment and any incidental relief in equity in aid of such a judgment." See also *United States* v. *Jones,* 131 U.S. 1, 19 (1889).

B. *Appellant has no priority right to purchase the house:*—Appellant's attempt to classify herself as an "occupant" of this particular dwelling ignores the definition of that term as set forth in the Atomic Energy Community Act of 1955, 42 U.S.C. secs. 2301 *et seq.,* 69 Stat. 473. Section 2304(g) of that Act states:

> The term *"occupant" means a person* who, on the date on which the property in question is first offered for sale, is *entitled to residential occupancy* of the Government-owned house in question, or of a family dwelling unit in such house, *in accordance with a lease or license agreement* with the Commission or its property-management contractor. (Emphasis supplied).

Thus, in view of appellant's admission that she has never held a lease on these premises, even a superficial investigation of appellant's argument in Point III of

her brief discloses the lack of any merit in her claim of the right to purchase the dwelling on the premises. Moreover, at the trial the Housing Officer for AEC made it clear that it is the administrative view under the regulations that the lease on that particular house could be transferred only to wives whose husbands have died or to separated wives who work (R. 25). Not being in either of these categories, appellant was ineligible to lease or purchase. See 10 CFR 130.1, 130.21.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court was correct and should be affirmed.

Respectfully.

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